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Articles

Annual Review of Developments on Instructions—2000[1]

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Introduction

This article is one in a series of annual reviews of military instructional issues and primarily covers cases decided in fiscal year 2000.[2] The target audience is the military trial practitioner, though anyone with an interest in jury instructions may find the article beneficial. Trial and defense counsel are reminded, however, the primary resource for drafting instructions remains the *Military Judges' Benchbook*.[3]

Substantive Criminal Law Instructions

Vicarious Liability: United States v. Browning

There are a variety of ways under the military justice system in which an individual can be held criminally liable for the actions of others. The concept is known as vicarious liability (VL), and it is expressly described in the Uniform Code of Military Justice: "Any person punishable under this chapter who—commits an offense punishable by this chapter, or aids, abets, counsels, commands or procures its commission . . . is a principal."[4] In other words, "[a] person who aids, abets, counsels, commands, or procures the commission of an offense is equally guilty of the offense as one who commits it directly, and may be punished to the same extent."[5]

Military justice practitioners commonly associate this provision with "accomplice liability," but the Court of Appeals for the Armed Forces (CAAF) has interpreted Article 77 much more broadly. Chief Judge Everett observed in an opinion published in 1986: "Although Article 77 does not specifically deal with the vicarious liability of a coconspirator, we believe that the language of Article 77(1) is broad enough to encompass it."[6] As such, "each conspirator is liable for all offenses committed pursuant to the conspiracy by any of the co-conspirators while the conspiracy continues and the person remains a party to it."[7] The *Benchbook* contains a pattern instruction describing this concept for the members.[8]

This concept occasionally causes some difficulty for practitioners in a variety of ways. The general practice in the military justice system is that all principals are charged as if they were the actual perpetrators of the crime;[9] a specification alleging larceny by a co-conspirator will generally read, "In that you, did, at or near (location) on or about (date) steal property, of some value, the property of the victim." There is not necessarily any explicit indication that the prosecution is alleging that the accused is vicariously liable for the larceny, and the pleadings may not give any notice to defense counsel that vicarious liability is going to be in issue. The most common way in which the defense counsel and the military judge will know of the vicarious liability issue is because the trial counsel has also charged a conspiracy involving the same conduct. Even in the absence of such pleadings, the defense counsel will learn hope-

1. The authors gratefully acknowledge the assistance of Colonel John Galligan and Colonel Kenneth Clevenger, Chief Circuit Judges for the Third and Fifth Judicial Circuits, respectively.

2. *See, e.g.*, Colonel Ferdinand D. Clervi, et al., *Annual Review of Developments in Instructions—1999*, Army Law., Apr. 2000, at 108.

3. U.S. Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook (1 Apr. 2001) [hereinafter Benchbook].

4. UCMJ art. 77 (2000).

5. Manual for Courts-Martial, United States, pt. IV, ¶ 1.b. (2000) [hereinafter MCM].

6. United States v. Jefferson, 22 M.J. 315, 324 (1986).

7. MCM, *supra* note 5, ¶ 5.c.(5).

8. Benchbook, *supra* note 3, para. 7-1-4.

9. MCM, *supra* note 5, R.C.M. 307(c)(3) Discussion.

fully of the theory during the pretrial investigation or when he receives notice, in response to his request, of the general nature of the other uncharged crimes, wrongs, or acts that the prosecution intends to introduce at trial. Occasionally, though, one or more of the relevant actors is still unsure about the theory of criminal liability prior to trial, and the military judge is called on to order a bill of particulars or similar relief prior to trial.

Vicarious liability can also rear its head during the instructional phase of the trial. In *United States v. Browning*,[10] the accused was charged with larceny of currency from the U.S. government, but was not charged with conspiracy to commit larceny. The trial counsel nevertheless gives the accused notice of his intent to introduce other uncharged crimes, wrongs, and acts in the form of testimony by various individuals that the government believed were the co-conspirators with the accused. The accused moved in limine to exclude the evidence, but was unsuccessful.[11]

The contested evidence establishing the actions of co-conspirators was eventually admitted, and the military judge instructed, in accordance with a prosecution request, on the prosecution's theory of vicarious criminal liability. He told the members that the accused could be found guilty if he aided and abetted another in committing an offense. He also instructed the members that the accused could be found guilty if he was a member of a conspiracy and the actual criminal act was done by another conspirator in furtherance of the conspiracy.[12] At the conclusion of these instructions, defense counsel objected to the conspiracy instruction as misleading.[13]

In response to this objection, the military judge reiterated his instructions on vicarious liability and ensured that the panel understood them. Significantly, the military judge then asked counsel if they had any objections to the instructions; the defense counsel asked in response if a spillover instruction had been given, and when assured by the military judge that one had been given, the defense counsel said, "Then I have no objections."[14] The accused was convicted and on appeal asserted that the military judge erred by admitting evidence of an uncharged conspiracy and giving the vicarious liability instructions.[15]

On appeal, the CAAF held unanimously that "the military judge did not err by permitting the Government to prove some of the offenses on a theory of vicarious liability, even though a conspiracy was not specifically alleged on the charge sheet."[16] The court compared the charge sheet to a federal indictment, and quoted federal precedent for the proposition that the purpose of the indictment was "to state concisely the essential facts constituting the offense, not how the government plans to go about proving them."[17] The court also stated that the defense counsel had waived any objection to the instructions at trial when, notwithstanding his earlier objection, the defense counsel said he had "no objections" in response to the military judge question after he had repeated the VL instructions to the members. Since the court held that there was no error at all, they did not even reach the question of plain error regarding the instructions.[18]

The basic lesson of this case is that it is generally permissible to allow the government to introduce evidence of vicarious liability of the accused and thereafter instruct on vicarious liability, even if the pleadings do not expressly mention vicarious liability. Pattern instructions concerning the various forms of vicarious liability can be found at paragraph 7-1 in the *Benchbook*. They are located in chapter seven with evidentiary instructions rather than those concerning offense definitions.

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10. 54 M.J. 1 (2000).

11. *Id.* at 3-4.

12. *Id.* at 4-5.

13. The objection was articulated as follows:

> I object to the conspiracy instruction being given because I'm afraid that it's misleading the Panel into thinking that, even if for some reason they don't think [the accused] actually committed these offenses, that if he somehow was involved in this, they could find him guilty of conspiracy, and he's not charged with that and I don't believe that that's a lesser included [sic].

Id. at 5.

14. *Id.* at 6.

15. *Id.* at 3.

16. *Id.* at 8.

17. *Id.* at 7.

18. *Id.* at 8.

Another practice pointer for all parties concerns waiver. The pattern trial script in the *Benchbook* prompts the military judge to ask counsel twice if they object to instructions: once at the discussion of findings instructions, and once at the conclusion of the instructions themselves. The military judge should be sure not to omit those questions of counsel, and if the military judge does have to reinstruct the members for any reason, counsel should be asked for objections or requests for additional instruction after the supplementary instruction is completed. A negative response from defense counsel, without more, may waive the initial objection made to the instruction.

The unanswered question that remains after *Browning* is what to do in the case if there is no notice *at all* to defense counsel that the government intends to rely on a theory of vicarious liability and the defense counsel has made no request for a bill of particulars: if the evidence tends to establish vicarious liability, should the military judge instruct on vicarious liability in this circumstance in the absence of notice or take other measures? This issue was not presented in *Browning* and is a closer question. The prudent military judge should inquire of trial counsel as to whether the government intends to seek instruction on vicarious liability as soon as evidence is introduced that tends to support that theory of liability. In an appropriate case, the defense counsel may decide to seek a continuance to prepare a defense to the theory of vicarious liability, or move for a mistrial "when such action is manifestly necessary in the interest of justice."[19]

Accomplice Liability: United States v. Williams

Lieutenant Commander Dudley Williams, U.S. Navy, was charged with, and convicted of, a variety of offenses including soliciting an enlisted person to distribute heroin.[20] In support of this offense, the prosecution offered only the testimony of former Chief Petty Officer Jeffrey Kendall. In his testimony, Kendall described himself as an accomplice of the accused.[21] The accused described him as a "chronic liar" and, as such, challenged the sufficiency of the evidence against him for this charge on appeal.[22] The court of appeals held that Kendall's testimony against the accused was legally sufficient to sustain the conviction, and affirmed.[23]

In the course of evaluating the legal sufficiency of the evidence against the accused, the CAAF made several observations that may be relevant to the form of instructions concerning accomplice liability. Judge Sullivan, writing for a unanimous court, stated that military law no longer requires corroboration to support a conviction, even when the accomplice's testimony is "self-contradictory, uncertain, or improbable."[24] According to Judge Sullivan, the proper standard is found in Rule for Courts-Martial (RCM) 918, which provides: "Findings may be based on direct or circumstantial evidence. Only matters properly before the court-martial on the merits of the case may be considered. A finding of guilty of any offense may be reached only when the factfinder is satisfied that guilt has been proved beyond a reasonable doubt."[25]

The only aspects of the previous rule that may survive in military law are those stated in the discussion accompanying RCM 918 in the MCM: "Findings of guilty may not be based solely on the testimony of a witness other than the accused which is self-contradictory, unless the contradiction is adequately explained by the witness. Even if apparently credible and corroborated, the testimony of an accomplice should be considered with great caution."[26]

In light of the CAAF's unanimous opinion in *Williams*, some portions of the pattern instruction on accomplice liability may be unnecessary to deliver to the members. For example, the pattern instruction now informs the members of the following:

> (Additionally, the accused cannot be convicted on the uncorroborated testimony of a purported accomplice if that testimony is self-contradictory, uncertain, or improbable.)
>
> (In deciding whether the testimony of (state the name of the witness) is self-contradictory, uncertain, or improbable, you must consider it in the light of all the instructions concerning the factors bearing on a witness' credibility.)
>
> (In deciding whether or not the testimony of (state the name of the witness) has been corroborated, you must examine all the evidence

19. MCM, *supra* note 5, R.C.M. 915(a).

20. United States v. Williams, 52 M.J. 218, 218-19 (2000).

21. *Id.*

22. *Id.* at 221.

23. *Id.* at 222.

24. *Id.*

25. *Id.*

26. *Id.*

> in this case and determine if there is independent evidence which tends to support the testimony of this witness. If there is such independent evidence, then the testimony of this witness is corroborated; if not, then there is no corroboration.)
> (You are instructed as a matter of law that the testimony of (state the name of the witness) is uncorroborated.)[27]

These parenthetical comments describing a purported requirement for corroboration of accomplice testimony in the pattern instruction may not be consistent with the current description of the law concerning findings in RCM 918. However, there is some ambiguity in the *Williams* opinion. After unreservedly asserting that there is no longer a corroboration requirement for accomplice testimony under military law, Judge Sullivan hedges his position by saying that "even if this evidentiary insufficiency rule is still good law . . . it was not violated in this case."[28] Judges and counsel that have a case involving testimony by an individual who may be an accomplice of the accused should review the *Williams* opinion for themselves before using an instruction that may no longer be consistent with the case law or RCM 918.[29]

Consent and Intoxication: United States v. Grier

Private First Class (PFC) Paul Grier, U.S. Army, was suspected of raping and sodomizing the wife of a fellow soldier. Special Agent (SA) Wagner of the Army Criminal Investigation Command interviewed PFC Grier and discovered that the alleged victim may have been intoxicated on the night in question.[30] Special Agent Wagner then told PFC Grier that "if a person is intoxicated, they are unable to consent" to intercourse, and that consent is "a verbal affirmation."[31] Special Agent Wagner did not explain to appellant that there are different levels of intoxication, nor did he clarify that "not all of these levels mean a victim is unable to consent to sexual intercourse."[32] Private First Class Grier then told SA Wagner that his case "was quite possibly a rape."[33]

While the statement that PFC Grier gave to SA Wagner apparently was not admitted into evidence at his subsequent trial for rape and sodomy, portions of the exchange described above were admitted as impeachment evidence.[34] The military judge gave the following instruction to the members:

> When a victim is incapable of consenting because she is asleep or unconscious or

27. BENCHBOOK, *supra* note 3, para. 7-10.

28. 52 M.J. at 222.

29. A simpler instruction, based on the current pattern instruction found in the *Benchbook* but without mention of a corroboration requirement, would read something like this:

> You are advised that a witness is an accomplice if he/she was criminally involved in an offense with which the accused is charged. The purpose of this advice is to call to your attention a factor specifically affecting the witness' believability, that is, a motive to falsify his/her testimony in whole or in part, because of self-interest under the circumstances. (For example, an accomplice may be motivated to falsify testimony in whole or in part because of his/her own self-interest in receiving (immunity from prosecution) (leniency in a forthcoming prosecution) (_____).) The testimony of an accomplice, even though it may be apparently credible, is of questionable integrity and should be considered by you with great caution.
>
> Whether (state the name of the witness), who testified as a witness in this case, was an accomplice is a question for you to decide. If (state the name of the witness) assisted, encouraged, advised, or in any other way associated or involved himself/herself with the offense with which the accused is charged with a criminal purpose or design, he/she would be an accomplice whose testimony must be considered with great caution. In deciding the believability of (state the name of the witness), you should consider all the relevant evidence (including but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The author suggests that revision of the pattern instruction to improve comprehension by the members of the court-martial is also in order. Such a revised instruction might read as follows:

> You have heard the testimony of _____, who (claimed to have) (has been described by [another witness] [other witnesses] as having) been involved in the same offense(s) with which the accused has been charged. You should view with great caution the testimony of any witness who may have been criminally involved in the commission of any offense with which the accused is charged, even if the testimony is apparently credible. Such a witness may have an interest in the outcome of this case that could give (him) (her) a motive to testify falsely. It is for you to determine whether the testimony of _____ has been affected by (self-interest) (an agreement [he] [she] may have with the government) ([his] [her] own interest in the outcome of the case) (prejudice against the accused) (_____). It is your duty to determine the believability of the witnesses, and you may give the testimony of each witness such weight as you think it deserves.

A thorough and generally well-reasoned analysis of this issue may be found in Colonel James A. Young, III, *The Accomplice in American Military Law,* 45 A.F. L. REV. 59 (1998).

30. United States v. Grier, 53 M.J. 30, 32 (2000).

31. *Id.*

> intoxicated to the extent that she lacks the mental capacity to consent, then no greater force is required than that necessary to achieve penetration . . . . If Cherise was incapable of giving consent and if the accused knew or had reasonable cause to know that Cherise was incapable of giving consent because she was asleep or unconscious or intoxicated, the act of sexual intercourse was done by force and without her consent.[35]

This instruction generally follows the text of the pattern instruction at note 11 in para. 3-45-1 of the *Military Judges' Benchbook*, and the defense counsel did not object to the instruction as given. The judge reminded the members that "any references by counsel to the law or to my instructions do not constitute instructions on the law, which may only be given by me in my judicial capacity."[36] The military judge also told the members "that they were bound by his statements of the law; that is, witnesses and counsel cannot tell members what the law is."[37]

The accused was ultimately convicted of rape and other offenses, and the Army Court of Criminal Appeals (ACCA) affirmed the findings. The CAAF granted review on the following issue:

> Whether the military judge erred as a matter of law by failing to properly define the law of 'consent' and 'intoxication' for the members, where the military judge also failed to inform the members that the legal conclusions used by the . . . Criminal Investigation Command agent during appellant's interrogation were erroneous.[38]

In the unanimous opinion of the court affirming the accused's conviction, Chief Judge Crawford noted that the military judge had explained to the members that he was the sole source of law and accurately explained the law concerning consent to the members.[39] As for the meaning of the phrase "or intoxicated" as used by the military judge in his instructions, the CAAF adopted ACCA's conclusion that "in the context of the descriptive terms preceding that phrase and the totality of all the instructions given on this issue, [the phrase] could only be understood to address intoxication to a degree rendering legal consent impossible."[40] Especially in the absence of any objection by defense counsel to the instructions at issue, the CAAF held "that there was no error and no prejudice to appellant's substantial rights."[41]

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32. *Id*. at 32-33.

33. *Id*. at 33.

34. *Id*. Special Agent Wagner and the accused had the following exchange:

> Q. In your honest opinion, do you think Mrs. LEWIS was in a state of mind where she could give consent to having intercourse?
> A. No.
> Q. Why do you think Mrs. LEWIS did not give consent to intercourse?
> A. She was not in her right state of mind.
> Q. What is your definition of rape?
> A. Forcing someone to have sex when they do not want to or have intercourse with someone who is not in their right state of mind.
> Q. What do you mean not in their right state of mind?
> A. Not fully aware of the situation.
> Q. By your definition, what do you call the events on 7 Jun 96?
> A: It is quite possibly a rape case.
> Q. Do you have anything to add to this statement?
> A. At the time this happened, I did not know if a woman is not capable of giving consent, it is rape. Now I know it is rape.

Id.

35. *Id*.

36. *Id*.

37. *Id*.

38. *Id*. at 31.

39. *Id*. at 34.

40. *Id*. (citation omitted).

41. *Id*.

There are two key practice pointers to take away from the opinion in *Grier.* The first concerns the presentation of evidence: The military judge and counsel should always be alert to the possibility that a witness may stray into testimony in the form of impermissible or inaccurate legal conclusions. This misstep is particularly likely to occur when the witness is involved with law enforcement, social work, and other fields that commonly use legal terms in their own professional contexts. Such testimony should be forestalled, if possible. If the testimony is unavoidable (as appeared to be the case in *Grier*), the military judge should consider giving a tailored curative instruction immediately after a witness testifies to a misleading or inaccurate legal conclusion in addition to the routine instructions on findings or sentence.

The second lesson for practitioners is that some modification of the pattern *Benchbook* instruction concerning intoxication and consent in the context of a sexual assault case may be appropriate. For example, note 11 of para. 3-45-1 informs the members concerning consent when the alleged victim of rape is asleep, unconscious, or intoxicated. By adding the phrase in italics below to the concluding paragraph of that (and similar) instruction, the military judge will ensure that the members properly understand the legal significance of intoxication in cases involving sexual assault:

> If (state the name of the alleged victim) was incapable of giving consent, and if the accused knew or had reasonable cause to know that (state the name of the alleged victim) was incapable of giving consent because she was (asleep) (unconscious) (intoxicated *to the extent that she lacks the mental capacity to consent*), the act of sexual intercourse was done by force and without consent.

What Is a Human Being?: United States v. Nelson

Hull Maintenance Technician Third Class Sharon Nelson, U.S. Navy, delivered her baby one evening alone in her room on board the ship to which she was assigned.[42] She sought no medical assistance during the delivery, and waited twelve hours before she presented herself and her dead child at a local civilian hospital.[43] As a result, she was charged with involuntary manslaughter through culpable negligence in violation of Article 119, UCMJ.[44] The evidence in the case raised the issue of whether the child was "born alive."[45] The government theory at trial was "that the child passed through the birth canal alive and that the infant had no congenital birth defects that would have caused death."[46] But testing during autopsy indicated that the child had never taken a single breath.[47]

As the CAAF observed on appeal, "[w]here . . . the evidence raises an issue as to whether a child 'had a separate and independent life prior to death,' it is necessary to define the term 'human being' in the course of providing instructions to the members on the issue of whether a 'human being' was killed."[48] In this regard, the military judge gave the following instruction at trial:

> Both the greater offense of involuntary manslaughter and the lesser offense of negligent homicide require proof beyond a reasonable doubt that the child was born alive in the legal sense, that is, the child had been wholly expelled from its mother's body and possessed or was capable of an existence by means of circulation independent of the mother's. Included in the term "circulation" is the child's breathing or capability of breathing from its own lungs. For the accused to be found guilty of either the greater offense of involuntary manslaughter or the lesser offense of negligent homicide, you must be convinced beyond a reasonable doubt based upon the evidence that the accused's newborn infant was born alive.[49]

The instruction was derived from an opinion of the Air Force Board of Review, *United States v. Gibson*,[50] and neither party objected to the instruction at trial.[51]

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42. United States v. Nelson, 53 M.J. 319, 322 (2000).

43. *Id.* at 325.

44. *Id.* at 321.

45. *Id.* at 322.

46. *Id.* at 321.

47. *Id.* at 322.

48. *Id.* at 321.

49. *Id.* at 322-23.

The accused was found guilty at trial, and the CAAF affirmed.[52] However, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) suggested that the "born alive" standard described by the military judge in his instructions provided inadequate protection, as a matter of public policy, to a newborn infant. The NMCCA extended the definition of "born alive" to those infants fully expelled from the mother, capable of existing independently of the circulatory system of the mother, and which also show "any other evidence of life such as beating of the heart, pulsation of the umbilical cord or definite movement of voluntary muscles."[53] Significantly under the instant facts, the CAAF concluded that "an infant *need not be breathing* at the time it is fully expelled from its mother so long as it 'shows any other evidence of life.'"[54]

The CAAF reviewed the decision of the service court to decide whether it had erred by adopting this so-called "viability" standard for determining if an infant is "born alive" in connection with a prosecution for manslaughter in violation of Article 119, UCMJ.[55] The CAAF rejected the approach of the lower court. While acknowledging that *Gibson* was not binding precedent on either the CAAF or the service court, the court stated that *Gibson* "accurately reflects the modern common law view."[56] The public policy concerns identified in the case were inadequate to persuade the CAAF that a court rather than a legislature should revise the definition of "human being" announced in *Gibson*.[57] The unanimous opinion of the court concluded "that the military judge's instructions were not in error and that it was unnecessary for the Court of Criminal Appeals to modify the *Gibson* standard."[58]

The primary lesson for practitioners to take from *Nelson* derives from an observation made by the service court in this case: "Neither the UCMJ nor the *Manual for Courts-Martial* defines the term 'human being,' or the term 'born alive.'"[59] The author of the service court opinion might have added that the *Benchbook* is likewise bereft of any guidance for crafting a proper instruction defining these terms. Counsel and military judges must be alert to the reality that the *Benchbook* does not and cannot contain pattern instructions for every possible topic that can be encountered in court-martial practice. The time to discover gaps in the coverage of the *Benchbook* is prior to trial, not when the members are waiting.

Instructional Omission: United States v. Davis

On 9 May 1995, the nine-month-old daughter of Hospitalman Darwinn Davis, U.S. Navy, died as a result of edema, caused by a subdural hematoma.[60] Davis was supervising his daughter at the time that she suffered the hematoma, and no one but the accused witnessed the events that caused the hematoma. Davis made three subsequent statements that all attempted to explain the injuries to his child as the result of his efforts to avoid a traffic accident while he and his daughter were riding in his vehicle. In the statements, the accused admitted that he had either failed to secure the car seat to the car itself using the seat belt or that he had failed to properly buckle the child into the car seat.[61]

Davis was charged with unpremeditated murder and making false official statements under the theory that the accused caused the subdural hematoma and consequent edema when he struck and shook his daughter.[62] The defense contention was that the accused caused the injuries to his daughter by swerving the car that he was driving to avoid a traffic accident while the child was not properly secured in her car seat.[63] At trial, the statements of the accused were admitted into evidence, but the

50. 17 C.M.R. 911 (A.F.B.R. 1954). The Air Force Board of Review in *Gibson* cited approvingly this description of the common law position as to when a child was born alive: "For the People were bound to establish . . . that the child was born alive in the legal sense, that is, had been wholly expelled from its mother's body and possessed or was capable of an existence by means of a circulation independent of her own[.]" *Id.* at 926 (citation omitted).

51. *Nelson*, 53 M.J. at 322.

52. *Id.* at 320.

53. *Id.* at 323 (citing United States v. Nelson, 52 M.J. 516, 521 (N-M. Ct. Crim. App. 1999), *aff'd*, 53 M.J. 319 (2000)).

54. *Id.*

55. *Id.* at 320.

56. *Id.* at 323.

57. *Id.*

58. *Id.* at 324.

59. United States v. Nelson, 52 M.J. 516, 520 (N-M. Ct. Crim App. 1999).

60. United States v. Nelson, 53 M.J. 202, 203 (2000).

61. *Id.* at 203-04.

62. *Id.* at 203.

accused did not testify.[64] Defense counsel requested an instruction concerning involuntary manslaughter as a lesser-included offense of the homicide charge, but did not request an instruction concerning negligent homicide as a lesser-included offense nor concerning accident as a special defense.[65] The military judge instructed the members on involuntary manslaughter by committing a battery on the child as a lesser included offense.[66] The military judge did not instruct on either negligent homicide or accident, nor did the defense object to the instructions that were given.[67] The accused was found guilty of involuntary manslaughter, and NMCCA affirmed his conviction.[68] The CAAF granted review to consider whether the trial judge erred by failing to give an instruction *sua sponte* on the special defense of accident or the lesser-included offense of negligent homicide.[69] The court held that the military judge did not err by failing to instruct the members on the special defense of accident, but it reached a different conclusion as to the lesser-included offense of negligent homicide. The failure of the military judge to instruct on negligent homicide was deemed reversible error, and the findings and sentence were set aside.[70]

The court began its analysis of both issues with a review of the applicable standards for when such instructions are required. The opinion of the court, authored by Judge Gierke and joined by three other judges, asserted that: "When evidence is adduced during the trial which 'reasonably raises' an affirmative defense or a lesser-included offense, the judge must instruct the court panel regarding that affirmative defense or lesser-included offense."[71] To reasonably raise the defense of accident in connection with the operation of a car, the court noted that there must be some evidence that the accused was driving "carefully, lawfully, and without neglect."[72] Since the accused had admitted in his various statements that he was negligent in failing to properly secure his daughter in her car seat, the court concluded that the military judge did not err by failing to instruct on the special defense of accident.[73]

The court approached the omitted instruction concerning negligent homicide somewhat differently. The opinion first observed that "[t]he test whether an affirmative defense is reasonably raised is whether the record contains some evidence to which the court members may attach credit if they so desire."[74] According to the CAAF, if the defense is "reasonably raised" by the evidence, "instructions on lesser-included offenses are required unless affirmatively waived by the defense."[75] In the instant case, there was some evidence that the accused killed his daughter by negligently shaking her, as well as some evidence that he killed his daughter by negligently securing her in her car seat.[76] However, as the court noted, "The members were never required to address whether appellant's negligence in any form—not attaching the seatbelt to the car seat, not properly fastening the straps in the car seat, or negligently shaking her—was the cause of the child's injuries and death."[77] As such, the omission by the military judge was deemed prejudicial error that warranted setting aside the findings and sentence.[78]

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63. *Id.*

64. *Id.* at 204.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 203.

69. *Id.*

70. *Id.* at 205.

71. *Id.*

72. *Id.* (citation omitted).

73. *Id.*

74. *Id.*

75. *Id.* (citation omitted).

76. *Id.* at 204.

77. *Id.* at 206.

78. *Id.*

The *Davis* opinion is full of treasures and landmines for the practitioner. The opinion of the court is a helpful reminder to military judges that they *must* instruct on *all* lesser-included offenses and special defenses at issue in a given case, even in the absence of a request by counsel. The CAAF reiterates the oft-forgotten point that the instructional duty of the military judge is largely independent of the theory of the parties in the case, and the quantum of evidence that triggers the duty is very small.[79] Each military judge should therefore develop a system for ensuring that no included offenses or special defenses are overlooked. The military judge should consult Part IV of the *Manual for Courts-Martial* prior to trial and identify the lesser-included offenses listed there for each charged offense.[80] The military judge should presume that he is going to give instructions concerning those included offenses unless the evidence in the case or other factors persuade him otherwise. There is, unfortunately, no equivalent listing of special defenses in the *Manual*. As such, the military judge should consider using a checklist of special defenses like that found in the *Army Judges' Reference Library* or similar collections to record those defenses raised by the evidence in the case.

The military judge should also consider adding to the trial script a "waiver query" pertaining to instructions. After discussing on the record with counsel the included offenses and defenses upon which the judge intends to instruct, the military judge should then ask the defense counsel if he waives instruction on any included offenses or special defenses not named by the military judge. While such a waiver may not end appellate litigation on the issue of omitted instructions, it may serve to move the locus of the litigation to the effective assistance of counsel rather than the apparent omission by the military judge.

A more troubling aspect of the *Davis* opinion is the terminology used by the court in discussing the instructional obligations of the military judge. The court repeatedly uses the term "reasonably raised" in connection with the amount of evidence required to trigger the instructional duty of the military judge.[81] However, the court defines the term as follows: an affirmative defense is reasonably raised when "the record contains some evidence to which the court members may attach credit if they so desire."[82] It is apparently the existence of "some evidence" that triggers the instructional duty, not its quality; indeed, the military judge must disregard the source of the evidence or its credibility in determining whether the threshold has been crossed. As the court states in *Davis*, "Any doubt whether an instruction should be given should be resolved in favor of the accused."[83] Moreover, RCM 920 (pertaining to instructions) does not use the term "reasonably raised" at all, but instead refers to an included offense or special defense as being "at issue."[84] The latter term is to be preferred to "reasonably raised" in that it is less likely to confuse the military judge or counsel into thinking that a qualitative evaluation of the evidence is required in deciding whether to instruct on an included offense or special defense.

Evidentiary Instructions

Trumpeting the Demise of "Curative Instructions"

Does this sound familiar? In a child rape case, the trial counsel calls an expert to testify about the typical responses of sexual abuse victims and whether the alleged victim exhibits symptoms consistent with one who was sexually abused.[85] Rather than answer the question posed, however, the expert responds: "Based on my evaluation of Mary, I believe her when she says she was sexually abused." The defense counsel imme-

79. *Id.* at 205.

80. Interestingly, negligent homicide is listed in Part IV of the *Manual* as a lesser-included offense of all homicides under Article 118, UCMJ, see MCM, *supra* note 5, pt. IV, ¶ 43.d.(2)(c), and involuntary manslaughter under Article 119, UCMJ. *See also* MCM, *supra* note 5, pt. IV, ¶ 44.d.(2)(b).

81. *E.g.*, *Nelson*, 53 M.J. at 205.

82. *Id.*

83. *Id.* (citation omitted).

84. MCM, *supra* note 5, R.C.M. 920(e)(5). The discussion accompanying RCM 920(e) goes on to assert that "a matter is 'in issue' when some evidence, without regard to its source or credibility, has been admitted upon which the members might rely if they choose." *Id.*

85. *See, e.g.*, United States v. Halford, 50 M.J. 402 (1999) (stating that an expert may offer evidence that the characteristics demonstrated by the victim led to a diagnosis of rape-trauma syndrome which is probative on the issue of consent); United States v. Birdsall, 47 M.J. 404 (1998) (stating that expert testimony that victim's conduct or statements are consistent with sexual abuse or consistent with complaints of sexually abused children normally admissible); United States v. Rynning, 47 M.J. 420 (1998) (questioning whether child's behavior consistent with individuals who have been raped or whether injuries are consistent with a child who has been battered are permissible); United States v. Marrie, 43 M.J. 35 (1995) (testifying that false allegations extremely rare and outside one's clinical experience is improper); United States v. Cacy, 43 M.J. 214 (1995) (testifying that expert explained importance of being truthful and based on child's responses recommended further treatment was an improper affirmation that expert believed the child); United States v. Houser, 36 M.J. 392 (C.M.A. 1993) (stating that expert may testify that certain behavior characteristics are consistent with a "rape trauma model"); United States Suarez, 35 MJ 374 (stating expert testimony regarding post traumatic stress syndrome and child sexual abuse accommodation syndrome and appearance of similar characteristics in sexually abused children and whether those characteristics seen in alleged victim is allowed); United States v. Harrison, 31 M.J. 330 (C.M.A. 1990) (stating that an expert may testify as to what symptoms are found among children who have suffered sexual abuse and whether the child-witness has exhibited these symptoms).

diately objects and moves for a mistrial. The military judge sustains the objection but denies the mistrial motion, concluding that strong instructions would cure the taint. In *United States v. Armstrong*,[86] the CAAF addressed this recurring problem and appears to have devalued the impact of such instructions.

Army Master Sergeant Michael Armstrong, a soldier with over twenty-three years of otherwise honorable service, allegedly committed indecent acts upon his fifteen-year-old stepdaughter, CA, over an eighteen-month period beginning in December 1994.[87] The stepdaughter testified the accused would come into her bedroom in the morning and wake her up by rubbing her shoulders, touching her and lowering himself so his penis was in her open hand.[88] The accused testified in his own defense and admitted accidental contact and exhibiting poor judgment; he denied doing anything for the purpose of arousing, appealing to or gratifying his lust or sexual desires.[89]

In rebuttal, the trial counsel called a psychologist who worked as a "validator" for the county social services department.[90] Her job was to evaluate children and determine if they display symptoms of sexual abuse. Recognizing the potential danger, the defense counsel objected to the testimony calling her "a human lie detector."[91] The trial counsel responded that he would not use the word "validator" and the witness would limit her testimony to symptoms consistent with sexual abuse. The military judge overruled the objection.[92] The psychologist took the stand and was asked if she was able to form an opinion as to whether CA exhibited characteristics and responses consistent with those exhibited by victims of sexual abuse.[93] The expert responded: "My opinion is that the information that I obtained during the course of the evaluation with [CA] is highly indicative of her being sexually abused by her father."[94] The defense counsel did not restate his objection and, on cross-examination, got the expert to admit that there could be other explanations for CA's behavior.[95] Immediately after the expert testified, the military judge instructed the members that they must disregard the expert's testimony to the extent that she implied that she believed CA or that a crime occurred.[96] The judge repeated the instruction before the members closed to deliberate on findings.[97]

On appeal, the government conceded the expert's response was error but argued it was harmless.[98] The CAAF disagreed. Significantly, the court found no other physical or testimonial evidence corroborating CA's allegations and described her in-court performance as "the ambiguous, uncertain testimony of a 17-year-old girl who appeared to live in a fantasy world and may be prone to perceptual inaccuracies."[99] Conversely, the court described the expert as "powerful, throwing the full weight of her impressive curriculum vitae behind her unequivocal and highly prejudicial conclusion that [CA] was sexually abused by her father."[100] While acknowledging that curative instructions have rendered such errors harmless in the past,[101] the court had "'grave doubts' about the military judge's ability

86. 53 M.J. 76 (2000).

87. *Id*. at 77.

88. *Id*.

89. *Id*. at 79.

90. *Id*. at 80.

91. *Id*.

92. *Id*.

93. *Id*. at 81.

94. *Id*.

95. *Id*.

96. The instruction, taken substantially from the *Benchbook*, was as follows:

> You are advised that only you, the members of the court, determine the credibility of the witness and what the facts of this case are. No expert witness can testify that the alleged victim's account of what occurred is true or credible, or that a sexual encounter occurred. To the extent that you believe that [the expert] testified or implied that she believes the alleged victim or that a crime occurred, you may not consider this as evidence that a crime occurred.

Id. at 81; *see also* Benchbook, *supra* note 3, para. 7-9-1.

97. *Armstrong*, 53 M.J. at 81.

98. *Id*.

99. *Id*.

to 'unring the bell'"[102] in this case and reversed the conviction.[103]

The practical value of the case is that it confirms the general rule that trial counsel should assume nothing and must repeatedly emphasize to their expert witnesses during the course of pretrial preparation to answer only the specific questions asked. Expert witnesses should not testify about victim credibility, should not infer that they believe a victim's allegations, and certainly should not testify that a victim was in fact sexually abused by the accused. It may also be a good idea for defense counsel to raise the issue in a pretrial Article 39(a) session and give the military judge the option of discussing the matter directly with the witness. If these prophylactic measures are not taken and the witness discloses similar improper opinions in front of the members, at least in cases where there is no physical or testimonial evidence corroborating the allegations, not only may curative instructions be insufficient to remove the taint, such error may no longer be considered harmless on appellate review.

The [Accused] Doth Protest Too Much, Me Thinks[104]*—"Other Acts" Evidence in Sex Cases*

American jurisprudence is grounded in the notion that we try cases rather than persons.[105] As such, the Military Rules of Evidence (MRE) generally prohibit the introduction of character and bad acts evidence against an accused if offered strictly to prove he is a bad person and is just the kind of service member who would commit the charged offenses.[106] When adopted for court-martial use on 6 January 1996,[107] MREs 413 and 414 represented a significant departure from this general prohibition and trial counsel have since found it easier in sexual assault and child molestation cases to introduce evidence of the accused's sexual history on the issue of the accused's propensity to commit these types of offenses.[108] While a number of service courts of criminal appeals have addressed the constitutionality of these rules,[109] it was not until last year that the CAAF decided the issue. In *United States v. Wright*, [110] the court held that MRE 413 did not violate an accused's due process or equal protection rights because of the military judge's requirement to weigh the probative value of the evidence against the risk of unfair prejudice.[111]

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100. *Id.*

101. *See, e.g.*, United States v. Harris, 51 M.J. 191 (1999) (given accused's express desire to avoid second trial coupled with curative instructions, military judge did not abuse his discretion in failing to sua sponte declare mistrial in case where trial counsel repeatedly elicited improper credibility testimony from expert witness); United States v. Skerrett, 40 M.J. 331 (C.M.A. 1994) (proper limiting instructions, along with presumption that members follow those instructions, eliminated risk of harm from improper expert credibility evidence).

102. *Armstrong*, 53 M.J. at 82 (citing Kotteakos v. United States, 328 U.S. 750, 766 (1946)).

103. *Id.*

104. With the sincerest of apologies to The Lady, see WILLIAM SHAKESPEARE, HAMLET, act 3, sc. 2.

105. Daniel J. Buzzetta, Note, *Balancing the Scales: Limiting the Prejudicial Effect of Evidence Rule 404(b) Through Stipulation*, 21 FORDHAM URB. L.J. 389 (1994).

106. Rule 404(a) provides that evidence of a person's character or trait of character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion. MCM, *supra* note 5, MIL. R. EVID. 404(a). The usual application of Rule 404(b)'s "other acts . . . other purposes," language also precludes prosecutorial use of the accused's uncharged acts to prove character. *Id.* MIL. R. EVID. 404(b) ("evidence of other crimes, wrongs, or acts is not admissible to prove character . . . . It may, however, be admissible for other purposes . . . .").

107. *See* STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL 615 (4th Ed. 1997).

108. "By propensity, I mean evidence offered to show the accused committed certain offenses in the past, thus has a disposition to commit such offenses, and is therefore more likely to have committed a similar offense on the occasion at issue." James S. Liebman, *Proposed Evidence Rules 413-415—Some Problems and Recommendations*, 20 U. DAYTON L. REV. 753, 754 (1995).

109. *See, e.g.*, United States v. Myers, 51 M.J. 570 (N-M. Ct. Crim. App. 1999).

110. 53 M.J. 476 (2000).

111. The CAAF resolved the same questions concerning the scope and applicability of MRE 414 in *United States v. David R. Henley*, 53 M.J. 488 (2000) (emphasis added).

In *Wright*, the court provided several factors the trial court should consider in the MRE 403 balancing test and the case is a good starting point for counsel to understand just what the trial judge considers in ruling on the admissibility of other sexual acts and child molestation evidence.[112] Recognizing the significance of these important developments in MREs 413 and 414, the Army Trial Judiciary recently approved a new "other crimes, wrongs or acts evidence" instruction for inclusion in the *Military Judges' Benchbook*, a copy of which is appended to this article as Appendix A.

Sentencing Instructions

Confinement, Forfeitures AND Fines, Oh My!

A Coast Guard special court-martial composed of a military judge alone convicted Joselito Tualla of unauthorized absence, disobeying lawful orders, wrongful use of anabolic steroids, assault, adultery, malingering, and obtaining $996.60 in telephone services.[113] The convening authority approved a sentence of a bad conduct discharge, confinement for five months, reduction to E2, forfeiture of $326 pay per month for six months and a $996.60 fine.[114] On its own motion, the Coast Guard Court of Criminal Appeals (CGCCA) disapproved the fine,[115] holding that RCM 1003(b)(3)[116] prevents a special court-martial from imposing a sentence that includes both a fine and forfeitures. In United States v. Tualla,[117] the CAAF reversed the lower court, again[118] holding that a special court-martial may impose a sentence that includes both a fine and forfeitures, when the combined fine and forfeitures do not exceed the amount of two-thirds forfeitures authorized for that forum.[119] The court further noted no inherent conflict between RCM 1003(b)(3) and Article 58B, which requires in certain circumstances automatic forfeitures during any period of confinement.[120]

Counsel are reminded, when seeking both a fine and forfeitures in member cases at a special court-martial, to insure that the military judge instructs that the combination cannot exceed the total amount of forfeitures authorized for that forum, calculated at the pay grade of any adjudged reduction.

Retirement Benefits, Revisited

In *United States v. Boyd*,[121] Captain Gregory Boyd, an Intensive Care Unit nurse at Eglin Air Force Base Hospital, Florida, pled guilty to damaging and stealing military property, wrongfully using three different controlled substances, and conduct unbecoming an officer.[122] He had completed fifteen years and six months of active service at the time of trial and his defense counsel requested an instruction concerning the effect of a dismissal on his potential retirement benefits[123] because, as an officer, he did not have to re-enlist in order to reach twenty years of service.[124] The military judge declined. On appeal, the

112. Some of these factors include: the time lapse between the acts; strength of proof of the prior act; probative weight of the acts and the potential for less prejudicial evidence; similarity between the acts; relationship between the parties; the circumstances surrounding each offense, such as the methods of commission, ages of the victims and the locations, manner and scope of abuse; and the frequency of the acts. *Wright*, 53 M.J. at 482. *See also* SALTZBURG ET AL., *supra* note 107, at 618.

113. *See* United States v. Tualla, 50 M.J. 563, 565 (C.G. Ct. Crim. App. 1999).

114. *Id*.

115. *Tualla*, 50 M.J. at 565.

116. R.C.M. 1003(b)(3) provides:

> Any court-martial may adjudge a fine instead of forfeitures. General courts-martial may also adjudge a fine in addition to forfeitures. Special and summary courts-martial may not adjudge any fine in excess of the total amount of forfeitures which may be adjudged in that case.

MCM, *supra* note 5, R.C.M. 1003(b)(3).

117. 52 M.J. 228 (2000).

118. *See* United States v. Harris, 19 M.J. 331 (C.M.A. 1985) (a fine and forfeitures can be combined at a single summary or special court-martial sentence so long as the combined total does not exceed the amount of the maximum forfeitures that could be adjudged at such a court). The CGCCA declined to follow *Harris* holding that, because the case was a two-judge decision with one judge concurring in the result, it was not binding precedent.

119. *Tualla*, 52 M.J. at 232.

120. Unless deferred by the convening authority, any sentence which includes confinement for more than six months (or death), or confinement for a lesser period and a punitive discharge will result in forfeiture of all pay and allowances in a general court-martial and two-thirds pay in a special court-martial, effective not later than fourteen days after the sentence is announced, for the duration of the member's confinement. *See* UCMJ art. 58b. The court recognized that careful consideration by the staff judge advocate in advising the convening authority on action would likely moot many of the issues associated with automatic forfeitures pushing the aggregate total of forfeitures and fines over the statutory maximum. *Tualla*, 52 M.J. at 232.

121. 52 M.J. 758 (A.F. Ct. Crim. App. 2000).

122. *Id*. at 760.

Air Force Court of Criminal Appeals (AFCCA) noted that the loss of retirement benefits for one who is eligible to retire at the time of trial is relevant and it is appropriate for the members to consider the consequences of a punitive discharge on those benefits.[125] The court further noted that one need not immediately be eligible to retire to present evidence or request an instruction but must be knocking at the door or perilously close to retirement to warrant such an instruction.[126] The court held that an officer who is four and a half years away from retirement eligibility is neither "knocking at the door," nor "perilously close" to retirement[127] and found the judge did not abuse his discretion[128] when he refused to instruct as requested.[129]

Counsel should recognize that whether the potential loss of retirement benefits is relevant will depend on the facts and circumstances of a given case and whether an accused has to re-enlist in order to reach twenty years of service is an important factor to consider.[130] However, the most significant factor remains the length of time between trial and potential retirement eligibility.[131]

Your Honor, Does Life Mean Life?: Instructing on Collateral Sentencing Matters

In *United States v. Duncan*,[132] Private First Class Timothy Duncan, United States Marine Corps, engaged in a series of brutal crimes against four individuals over a six-week period. He was eventually found guilty of attempted murder, attempted robbery, attempted forcible sodomy, conspiracy to rape and rape, larceny, kidnapping, communicating a threat, and carrying a concealed weapon.[133] At trial, the officer members interrupted their sentencing deliberations and asked the judge whether therapy would be required if the accused were to be confined and whether parole was available for a life sentence.[134] The defense counsel objected to answering the questions because they concerned collateral consequences and asked that the members be instructed that these questions were "off-limits."[135]

123. Once a punitive discharge is adjudged and ordered executed, it terminates a service member's military status and any concomitant right to receive military retirement benefits. *See* United States v. Sumrall, 45 M.J. 207, 208-09 (1996).

124. *Boyd*, 52 M.J. at 761.

125. *Id*. at 766.

126. United States v. Greaves, 46 M.J. 133, 139 (1997) (stating that it is an error not to instruct on effect of punitive discharge on retirement benefits for accused with nineteen years, ten months of service); United States v. Becker, 46 M.J. 141, 143 (1997) (stating that it is an error to exclude evidence of retirement benefits when accused was three and one-half months from retirement eligibility without need to re-enlist); United States v. Henderson, 29 M.J. 221 (C.M.A. 1989) (stating that an instruction on retirement benefits not required for enlisted member who was three years from retirement eligibility and would have to re-enlist to reach twenty-year point).

127. *Boyd*, 52 M.J. at 766.

128. United States v. Perry, 48 M.J. 197, 199 (1998) (stating that the judge's decision to give or deny instruction on consequences of a particular sentence is reviewed on appeal for an abuse of discretion).

129. *Boyd*, 52 M.J. at 767.

130. *Becker*, 46 M.J. at 141.

131. *Boyd*, 52 M.J. at 766.

132. 53 M.J. 494 (2000).

133. *Id*. at 495.

134. The members asked: "Will rehabilitation/therapy be required if Private First Class Duncan is incarcerated?" and, "In military justice, is parole granted or are sentences reduced for good behavior? If so, do these reductions apply to a life sentence?" *Id*. at 498.

135. *Id*.

The judge, however, answered the questions by first explaining to the members that they were an "independent agency" whose job it was to determine guilt or innocence and impose an appropriate sentence.[136] The judge then told the members that other authorities would review the case, but they should do whatever they felt was right and not rely on what others might do.[137] The judge concluded this portion of his response by telling the members that parole is available for those sentenced to confinement by a military court, including life imprisonment, but that the exercise of parole depends on several factors and that they should not be concerned about the impact of parole in determining what term of confinement they believe is appropriate.[138] Regarding rehabilitation, the judge told the members that although participation in such programs was not mandatory, treatment was available and incentives existed to encourage the confinee to participate.[139] The accused was sentenced to a dishonorable discharge, total forfeitures, confinement for life,[140] a $200 fine, and reduction to E-1.[141] On appeal, the CAAF considered the propriety of the military judge's response to these questions and found no error.[142]

In recent years, the court has rejected bright-line rules prohibiting instructions on collateral sentencing matters[143] and has adopted a flexible approach focusing on a military judge's responsibility to give "appropriate sentencing instructions."[144] Therefore, counsel must be prepared to offer information to the military judge in order to answer court member questions which rationally relate to the sentencing considerations in RCM 1005(e)(5), such as those asked in *Duncan*. In most cases, this will require counsel to identify in advance of trial the types of sentencing issues that potentially may arise during the course of the court-martial and conduct some basic pretrial research in order to assist the judge in responding to member questions.

You Don't Say! Restricting the Accused's Unrestricted Unsworn Statement

In two recent cases, the AFCCA looked at the scope of an accused's unsworn statement. In *United States v. Friedmann*,[145] the court addressed a military judge's instructions regarding the accused's reference to dispositions in other cases. In *United States v. Satterley*,[146] the court looked at the propriety of a military judge's refusal to permit an accused to respond to a member's question by making an additional unsworn statement.

At a special-court martial, Airman Tracy Friedmann pled guilty to absence without leave, dereliction of duty, wrongfully using marijuana, and wrongfully introducing marijuana onto a military installation. During his unsworn statement, the accused told the court members that two of the four airmen who smoked marijuana with him received Article 15s and general discharges. He asked the members not to adjudge a punitive discharge but allow the command to administratively separate him.[147] Without objection, the military judge instructed the members regarding the accused's reference to dispositions in other cases.[148] On appeal, the AFCCA held that a judge does not err in instructing the members on how to consider matters raised by the accused in an unsworn statement.[149]

Therefore, while an accused has a right to make a virtually unrestricted unsworn statement upon which he may not be cross-examined by the trial counsel or questioned by the court,[150] a military judge does not err in providing the members with accurate and balanced instructions on how to consider the information in an unsworn statement in order to place it in proper context. Therefore, defense counsel should balance the arguable benefit gained by an accused introducing arguably

136. *Id.* at 499.

137. *Id.*

138. *Id.*

139. *Id.*

140. The trial was held in 1995, before enactment of Article 56a, UCMJ, which created the possibility of a sentence of confinement for life without eligibility for parole. *See* National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 581(a)(1), 111 Stat. 1759 (1997).

141. *Duncan*, 53 M.J. at 496.

142. *Id*. at 500.

143. *See, e.g*., United States v. Greaves, 46 M.J. 133 (1997) (stating that is an error not to instruct on effect of punitive discharge on retirement benefits for accused with nineteen years and ten months of service at time of trial).

144. Rules for Court-Martial 1005(a) provides that "the military judge shall give the members appropriate instructions on sentence," and RCM 801(a)(5) provides that it is the duty of the military judge to "instruct members on questions of law and procedure which may arise."

145. 53 M.J. 800 (A.F. Ct. Crim. App. 2000).

146. 52 M.J. 782 (A.F. Ct. Crim. App. 1999).

147. *Friedman*, 53 M.J. at 801. An accused's right to allocution is virtually unrestricted. *See, e.g*., United States v. Jeffrey, 48 M.J. 229 (1998) (stating that it is error to preclude accused from stating he would be discharged administratively if court-martial did not impose a punitive discharge); United States v. Grill, 48 M.J. 131 (1998) (stating that it is error to preclude accused from informing members how civilian co-conspirator cases were handled).

irrelevant information via an unsworn statement against the detrimental impact a military judge's instructions, such as those used in *Friedmann*, could have on the members' deliberations before advising an accused whether or not to disclose such information in the first place.

Airman First Class Raymond Satterley pled guilty to absence without leave, willful destruction of military property, and larceny of laptop computers, and he elected to be tried by members.[151] Before they retired to deliberate on an appropriate sentence, the members asked the military judge what happened to the four laptop computers not recovered by the government.[152] During a UCMJ, Article 39(a) session outside the presence of the members, the defense counsel requested permission to reopen its case and have the accused answer the question by making an additional unsworn statement.[153] The judge denied the request but did state he would allow the accused to take the witness stand and testify under oath, among other options.[154] The accused did not testify under oath and neither side presented any other evidence. The judge eventually instructed the

148. The military judge instructed as follows:

> Now, during his unsworn statement, the accused indicated that his commander would initiate an administrative discharge against him if the court did not impose a punitive discharge. In that regard, you should consider the following language in AFI 36-3208, "Administrative Separation of Airmen," dated 14 October 1994, paragraph 1.21, subparagraph 3, "Limitation on Service Characterization:" "Do not discharge an airman under other than honor[able] conditions if the sole basis for discharge is a serious offense that results in conviction by a court-martial that did not adjudge a punitive discharge unless such characterization is approved by the Secretary of the Air Force."
>
> In this case, if the court does not adjudge a punitive discharge, the accused might be subject to administrative discharge under other than honorable conditions only if a discharge authority found some other basis for the accused's discharge—in addition to the offense that resulted in his conviction at this court-martial. If such other basis were found by the discharge authority or if the accused's command obtained specific approval by the Secretary of the Air Force, the discharge authority could—but would not be required to—impose an under-other-than-honorable-conditions discharge. Otherwise, the accused could only be discharged under honorable conditions. You, of course, should not rely on any of this in determining an appropriate punishment for this accused for the offenses of which he stands convicted. The issue before you is not whether the accused should remain a member of the Air Force, but whether he should be punitively separated from the service. If you don't conclude the accused should be punitively separated from the service, than [sic] it is none of your business or concern as to whether anyone else might choose to initiate separation action, or how the accused's service might be characterized by an administrative discharge authority.
>
> Now, also during his unsworn statement the accused indicated what happened to others for commission of some similar offenses. There is, of course, no evidence on that point, but even if there were, the disposition in other cases is irrelevant for your consideration in adjudging an appropriate sentence for this accused. You do not know all the facts of those other cases, not anything about the [airmen] in those cases, and it is not your function to consider those matters in this trial. Likewise, it is not your position to second-guess the disposition of other cases, or even to try and place the accused's case in its proper place on the spectrum of some hypothetical scale of justice.
>
> Even if you knew all the facts about other offenses and offenders, that would not enable you to determine whether the accused should be punished more harshly or more leniently, because the facts are different, and because the disposition authority in those other cases cannot be presumed to have any greater skill than you in determining an appropriate punishment. If there is to be any meaningful comparison of the accused's case to those of others similarly situated, it would come by consideration of the convening authority at the time he acts on the adjudged sentence in this case. The convening authority can ameliorate a harsh sentence to bring it in line with appropriate sentences in other similar cases, but he cannot increase a light sentence to bring it in line with similar cases. In any event, such action is within the sole discretion of the convening authority.
>
> You, of course, should not rely on this in determining what is an appropriate punishment for this accused for the offenses of which he stands convicted. If the sentence you impose in this case is appropriate for the accused and his offenses, it is none of your concern as to whether any other accused was appropriately punished for his offenses.
>
> You have the independent responsibility to determine an appropriate sentence, and you may not adjudge an excessive sentence in reliance upon mitigating action by higher authority. You must consider all the evidence in this case, and determine its relative importance by the exercise of your good judgment and common sense. Remember, that the accused is to be punished only for the offenses of which he has been found guilty by this court.

Friedman, 53 M.J. at 801-02.

149. *Id*. at 804.

150. MCM, *supra* note 5, R.C.M. 1001(c)(2)(C).

151. *Satterley*, 52 M.J. at 783.

152. *Id*. The court-martial has equal opportunity to obtain witnesses and other evidence, subject to regulation or restriction by the President. MCM, *supra* note 5, MIL. R. EVID. 614.

153. *Id*. at 783.

154. *Id.* The other options could include stipulations of fact or expected testimony or other testimonial or documentary evidence.

members that there was no evidence before them on the disposition of the other computers, that they should not speculate what happened to them, and that no adverse inference should be drawn against the accused.[155]

The accused argued on appeal that the military judge abused his discretion by not allowing him to respond to the question by making an additional unsworn statement.[156] The AFCCA disagreed. The court acknowledged that, while an accused's allocution rights[157] are broad,[158] they are not unlimited and when the court members ask a relevant question on other than procedural matters, the only proper method for answering it is by the introduction of physical, documentary or testimonial evidence.[159] While an unsworn statement is an authorized means to bring information to the attention of the members, it is not evidence because, when presenting it, the accused is not under oath.[160]

What should counsel take from this case? While an accused has a right to explain evidence offered by the government in response to a question by the court by making an additional unsworn statement,[161] he cannot answer the court's question via an unsworn statement because the unsworn answers are not evidence.

Script This

Contrary to his pleas, Private Charles Rush was convicted by members at a special court-martial of breach of the peace, two specifications of aggravated assault with a dangerous weapon, and communicating a threat.[162] At sentencing, the military judge read the standard bad-conduct discharge instruction in the *Benchbook*.[163] However, he refused defense counsel's requested instruction describing the permanent stigma of a punitive discharge, also contained in the *Benchbook*.[164] The adjudged and approved sentence included a bad-conduct discharge and six months confinement.[165]

On appeal, the accused argued the military judge committed prejudicial error by refusing to give the requested defense instruction. In *United States v. Rush*,[166] the CAAF agreed with the lower court that the military judge has a duty to explain why he is refusing to give a standard instruction requested by the

155. *Id.*

156. *Id*.

157. Rule for Courts-Martial 1001(c)(2)(C) provides in part: "an accused may make an unsworn statement and may not be cross-examined by the trial counsel upon it or examined upon it by the court-martial." MCM, *supra* note 5, R.C.M. 1001(c)(2)(C).

158. *See, e.g.*, United States v. Britt, 48 M.J. 233 (1998) (stating that an accused can state he would be discharged administratively if court-martial did not impose a punitive discharge); United States v. Grill, 48 M.J. 131 (1998) (stating that an accused can relate what co-conspirators received).

159. *Satterly*, 52 M.J. at 785.

160. *See* United States v. Provost, 32 M.J. 98, 99 (C.M.A. 1991).

161. *Id*. (stating that an accused is entitled to make second unsworn statement to explain uttering of bad checks after government introduced the evidence to rebut his first unsworn statement).

162. United States v. Rush, 51 M.J. 605 (Army Ct. Crim. App. 1999).

163. The instruction, taken directly from the *Benchbook*, provided:

> You are advised that a bad conduct discharge deprives a soldier of virtually all benefits administered by the Veterans' Administration and the Army establishment. A bad conduct discharge is a severe punishment and may be adjudged for one who, in the discretion of the court, warrants more severe punishment for bad conduct, even thought the bad conduct may not constitute commission of serious offenses of a military or civil nature. In this case, if you determine to adjudge a punitive discharge, you may sentence Private Rush to a bad-conduct discharge; no other type of discharge may be ordered in this case.

Id. at 606 (citing BENCHBOOK, *supra* note 3, para. 2-6-10 (pattern instruction addressing the effect of a bad conduct discharge)).

164. This instruction provides:

> You are advised that the ineradicable stigma of a punitive discharge is commonly recognized by our society. A punitive discharge will place limitations on employment opportunities and will deny the accused other advantages which are enjoyed by one whose discharge characterization indicates that (he) (she) has served honorably. A punitive discharge will affect an accused's future with regard to (his) (her) legal rights, economic opportunities and social acceptability.

Id. at 607 (citing BENCHBOOK, *supra* note 3, para. 2-6-10 (addressing stigma of a punitive discharge)).

165. *Rush*, 51 M.J. at 606.

166. 54 M.J. 313 (2001).

defense and held that the military judge erred in refusing to give the requested instruction without explaining the basis for his decision on the record.[167] The court, however, found the error harmless and affirmed.[168]

It is important that practitioners not read too much into this case. While a military judge is required to give members appropriate sentencing instructions,[169] he has broad discretion in selecting which instructions to give.[170] In *Rush*, the court is not holding that standard *Benchbook* instructions are now required in all cases upon defense request.[171] The court did state, however, that the judge has a duty to explain why he is refusing to do so and the decision not to give a reason in this case was arbitrary and unreasonable.[172] However, in any given case, as instructions must be tailored to the facts, it is possible that a reason can be given[173] so trial counsel should request such an explanation if the judge is not forthcoming.

167. *Id*. at 315.

168. *Id*. at 316.

169. MCM, *supra* note 5, R.C.M. 1005(a).

170. United States v. Greaves, 46 M.J. 133, 139 (1997) (citing United States v. Wheeler, 38 C.M.R. 72, 75 (C.M.A. 1967)).

171. *Rush*, 54 M.J. at 317 (Crawford, C.J., concurring). The military judge is only required to advise the members of: (1) the maximum punishment; (2) the effect any sentence would have on the accused's entitlement to pay and allowances; (3) deliberation and voting procedures; (4) that they are solely responsible for selecting the sentence and must not rely on the possibility of mitigating action by higher authority; and (5) that they should consider all matters in extenuation, mitigation and aggravation, whether introduced before or after findings, and all other matters presented. *See* MCM, *supra* note 5, R.C.M. 1005(e).

172. *Rush*, 54 M.J. at 315.

173. For example, it may be the case that society no longer views a punitive discharge as a permanent stigma and the judge may conclude, under the circumstances of the case, that imposition of a punitive discharge might not actually affect this particular service member's economic rights, employment opportunities or social acceptability.

Appendix A

The Army Trial Judiciary recently replaced the current *Military Judges' Benchbook* Instruction 7-13-1, Uncharged Misconduct—Other Acts or Offenses, with the following:

7-13-1. OTHER CRIMES, WRONGS, OR ACTS EVIDENCE

NOTE 1: <u>The process of admitting other acts evidence</u>. Whether to admit evidence of other crimes, wrongs, or acts is a question of conditional relevance under MRE 104(b). In determining whether there is a sufficient factual predicate, the military judge determines admissibility based upon a three-pronged test: (1) Does the evidence reasonably support a finding by the court members that the accused committed the prior crimes, wrongs, or acts? (2) Does the evidence make a fact of consequence more or less probable? (3) Is the probative value of the evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or any other basis under MRE 403? If the evidence fails any of the three parts, it is inadmissible.

NOTE 2: <u>Using these instructions</u>. If the accused requests, trial counsel is required to provide reasonable notice, ordinarily in advance of trial, before offering evidence of other crimes, wrongs, or acts under MRE 404(b). When evidence of a person's commission of other crimes, wrongs, or acts is properly admitted prior to findings as an exception to the general rule excluding such evidence (See NOTE 1 on the process of admitting such evidence), the limiting instruction following this NOTE must be given upon request or when otherwise appropriate. When evidence of prior sexual offenses or child molestation has been admitted, the instructions following NOTES 3 and 4 may be appropriate in lieu of the below instruction.

You may consider evidence that the accused may have (<u>state the evidence introduced for a limited purpose</u>) for the limited purpose of its tendency, if any, to:

(identify the accused as the person who committed the offense(s) alleged in _____)

(prove a plan or design of the accused to_____)

(prove knowledge on the part of the accused that_____)

(prove that the accused intended to _____)

(show the accused's awareness of (his) (her) guilt of the offense(s) charged)

(determine whether the accused had a motive to commit the offense(s))

(show that the accused had the opportunity to commit the offense(s))

(rebut the contention of the accused that (his) (her) participation in the offense(s) charged was the result of (accident) (mistake) (entrapment))

(rebut the issue of _____ raised by the defense); (and)

(_____).

You may not consider this evidence for any other purpose, and you may not conclude from this evidence that the accused is a bad person or has general criminal tendencies and that (she) (he), therefore committed the offense(s) charged.

NOTE 3: <u>Sexual assault and child molestation offenses – MRE 413 or 414 evidence</u>. In cases in which the accused is charged with a sexual assault or child molestation offense, Military Rules of Evidence 413 and 414 permit the prosecution to offer, and the court to admit, evidence of the accused's commission of other sexual assault or child molestation offenses on any matter to which relevant. Unlike misconduct evidence that is not within the ambit of MRE 413 or 414, the members may consider this evidence on any matter to which it is relevant, to include the issue of the accused's propensity or predisposition to commit these types of crimes. The government is required to disclose to the accused the MRE 413 or 414 evidence that is expected to be offered under the rule at least 5 days before trial. When evidence of the accused's commission of other offenses of sexual assault under MRE 413, or of child molestation under MRE 414, is properly admitted prior to findings as an exception to the general rule excluding such evidence, the MILITARY JUDGE should give the following appropriately tailored instruction upon request or when otherwise appropriate.

You have heard evidence that the accused may have previously committed (another) (other) offense(s) of (sexual assault) (child molestation). You may consider the evidence of such other act(s) of (sexual assault) (child molestation) for (its) (their) tendency, if any, to show the accused's propensity to engage in (sexual assault) (child molestation), as well as (its) (their) tendency, if any, to:

(identify the accused as the person who committed the offense(s) alleged in _____)

(prove a plan or design of the accused to_____)

(prove knowledge on the part of the accused that_____)

(prove that the accused intended to _____)

(show the accused's awareness of (his) (her) guilt of the offense(s) charged)

(determine whether the accused had a motive to commit the offense(s))

(show that the accused had the opportunity to commit the offense(s))

(rebut the contention of the accused that (his) (her) participation in the offense(s) charged was the result of (accident) (mistake) (entrapment))

(rebut the issue of _____ raised by the defense); (and)

(_____).

You may not, however, convict the accused merely because you believe (she) (he) committed (this) (these) other offense(s) or merely because you believe he has a propensity to engage in (sexual assault) (child molestation). The prosecution's burden of proof to establish the accused's guilt beyond a reasonable doubt remains as to each and every element of (each) (the) (offense(s) charged.

NOTE 4: Use of Charged MRE 413/414 Evidence. There will be circumstances where evidence relating to one charged sexual assault or child molestation offense is relevant to another charged sexual assault or child molestation offense. If so, the following instruction may be used, in conjunction with NOTE 3, as applicable.

(Further), evidence that the accused committed the (sexual assault) (act of child molestation) alleged in [state the appropriate specification(s) and Charge(s)] may be considered by you as evidence of the accused's propensity, if any, to commit the (sexual assault) (act of child molestation) alleged in [state the appropriate specification(s) and Charge(s)]. You may not, however, convict the accused of one offense merely because you believe (he) (she) committed (this) (these) other offense(s) or merely because you believe (he) (she) has a propensity to commit (sexual assault) (child molestation). Each offense must stand on its own and proof of one offense carries no inference that the accused is guilty of any other offense. In other words, proof of one (sexual assault) (act of child molestation) creates no inference that the accused is guilty of any other (sexual assault) (act of child molestation). However, it may demonstrate that the accused has a propensity to commit that type of offense. The prosecution's burden of proof to establish the accused's guilt beyond a reasonable doubt remains as to each and every element of each offense charged.

NOTE 5: Use of other acts evidence in sentencing proceedings. When evidence has been admitted on the merits for a limited purpose raising an inference of uncharged misconduct by the accused, there is normally no sua sponte duty to instruct the court members to disregard such evidence in sentencing, or to consider it for a limited purpose. Although the court in sentencing is ordinarily permitted to give general consideration to such evidence, it should not be unnecessarily highlighted. Evidence in aggravation, however, must be within the scope of RCM 1101(b). A limiting instruction on sentencing may be appropriate sometimes, for example, when evidence of possible uncharged misconduct has been properly introduced but subsequently completely rebutted, or when the inference of possible misconduct has been completely negated. For example, if there were inquiry of a merits character witness whether that witness knew the accused had been arrested for an uncharged offense, to impeach that witness' opinion, and it was then shown that the charges underlying the arrest were dismissed or that the accused was acquitted, it may be appropriate on sentencing to instruct that the arrest be completely disregarded in determination of an appropriate sentence. In such case, there is actually no proper evidence of uncharged misconduct remaining at all, and the court members might improperly consider the inquiry regarding the arrest alone as being adverse to the accused. Instruction 7-18, "Have You Heard" Questions to Impeach is appropriate when "have you heard/do you know" questions regarding uncharged misconduct have been asked.

REFERENCES

a. MRE 105, 403, 404(b), 413, and 414.

b. Application of Federal Rules of Evidence and Military Rules of Evidence 413 and 414: *United States v. Wright*, 53 M.J. 476 (2000); *United States v. Henley*, 53 M.J. 488 (2000); *United States v. Parker*, 54 M.J. 700 (Army Ct. Crim. App. 2001) (disclosure requirements); and *United States v. Myers*, 51 M.J. 570 (N-M. Ct. Crim App. 1999).

c. Test for admissibility under MRE 404(b): *United States v. Mirandez-Gonzalez*, 26 M.J. 411 (C.M.A. 1988); *United States v. Reynolds*, 29 M.J. 105 (C.M.A. 1989), and *Huddleston v. United States*, 485, U.S. 681 (1988).

Innovative Readiness Training Under 10 U.S.C. § 2012: Understanding the Congressional Model for Civil-Military Projects

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[I]nnovation rarely makes its way by gradually winning over and converting its opponents: . . . What does happen is that its opponents gradually die out and the growing generation is familiarized with the idea from the beginning.

Max Planck[1]

Not a whit, we defy augury; there's a special providence in the fall of a sparrow. If it be now, 'tis not to come; if it be not to come, it will be now; if it be not now, yet it will come: the readiness is all.

William Shakespeare[2]

Training is everything. The peach was once a bitter almond; cauliflower is nothing but cabbage with a college education.

Mark Twain[3]

Introduction

You are the staff judge advocate at a large command. Your commander receives a phone call one day from the chancellor of a nearby state university. It seems the university wants to build a new track field but cannot afford the construction costs. The chancellor wants to know if the local military could lend a hand by sending some construction personnel and equipment to help out with the project. The commander, not wanting to break the law, turns to you for advice, saying, "Let's try to find a legal way to do this, if possible. I think it would be good public relations and valuable training for our engineers." Your immediate reaction, though a silent one, is not positive. Thinking back to your days as an ethics counselor and operational law attorney, you cannot immediately envision a legal means of undertaking such a huge commitment in the civilian community. In fact, doing so would seem to counter a basic presumption that non-emergency military involvement in civilian projects should be extremely limited.[4] Worried about giving the commander a hasty answer, however, you decide to research the issue.

Phone calls such as this are becoming more frequent in the post- Cold War era. One reason for this increase is a relatively new program known as "innovative readiness training," or IRT, which is "[m]ilitary training conducted off base in the civilian community that utilizes the units and individuals of the Armed Forces . . . to assist civilian efforts in addressing civic and community needs of the United States, its territories and possessions, and the Commonwealth of Puerto Rico."[5] As word has spread about the IRT program, both civilian and military leaders have increasingly turned to the armed forces as an asset in conducting domestic projects.[6] Military attorneys must understand the parameters of the IRT program before providing advice to commanders.

1. MAX PLANCK, THE PHILOSOPHY OF PHYSICS (1936), *quoted in* BARTLETT'S FAMILIAR QUOTATIONS, EXPANDED MULTIMEDIA EDITION (1995).

2. WILLIAM SHAKESPEARE, HAMLET, act 5, sc. 2, l. 232 (1600-1601), *quoted in* BARTLETT'S FAMILIAR QUOTATIONS, EXPANDED MULTIMEDIA EDITION (1995).

3. MARK TWAIN, PUDD'NHEAD WILSON, ch. 5 (1894), *quoted in* BARTLETT'S FAMILIAR QUOTATIONS, EXPANDED MULTIMEDIA EDITION (1995).

4. The strong American interest in limiting military involvement in civilian affairs dates back to the Declaration of Independence, which stated among its reasons for seeking liberty from Great Britain that the King "has affected to render the Military independent of and superior to the Civil power." THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776). For a diverse discussion by military officers and officials of the proper balance in civil-military relations, see the following articles: Lieutenant Commander W. Kent Davis, *Swords into Plowshares? The Dangerous Politicization of the Military in the Post-Cold War Era*, 33 VAL. U. L. REV. 61 (1998); Colonel Charles J. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civilian Control of the Military*, 29 WAKE FOREST L. REV. 341 (1994); Richard H. Kohn, *Out of Control: The Crisis in Civil-Military Relations*, THE NAT'L INTEREST, Spring 1994, at 3; Captain Edward B. Westermann, *Contemporary Civil-Military Relations: Is the Republic in Danger?*, AIRPOWER J., Summer 1995, *available at* http://www.airpower.maxwell.af.mil/airchronicles/apj/wester.html.

5. U.S. DEP'T OF DEFENSE, DIR. 1100.20, SUPPORT AND SERVICES FOR ELIGIBLE ORGANIZATIONS AND ACTIVITIES OUTSIDE THE DEPARTMENT OF DEFENSE, para. E2.1.8 (30 Jan. 1997) [hereinafter DOD DIR. 1100.20].

6. For example, in fiscal year 1997, military units participated in approximately 129 IRT projects. *See* GAO LETTER REP. NO. GAO/NSAID-98-84, CIVIL MILITARY PROGRAMS: STRONGER OVERSIGHT OF THE INNOVATIVE READINESS PROGRAM NEEDED FOR BETTER COMPLIANCE (Mar. 12, 1998), *available at* http://www.fas.org/man/gao/nsiad98084.htm. By fiscal year 1998, this number had risen to approximately 176. *See* Office of the Assistant Secretary of Defense for Reserve Affairs, *Civil-Military Innovative Readiness Training*, *at* http://raweb.osd.mil/initiatives/irt.htm (last visited Jan. 21, 2000) [hereinafter IRT Web Site]. By fiscal year 1999, the number exceeded 200. *See* Linda D. Kozaryn, *Innovative Training Benefits Troops, Communities*, American Forces Press Service, Oct. 1999, *at* http://www.defenselink.mil/news/Oct1999/n10271999_9910272.html. This amounts to a more than fifty-five percent increase in only two years.

This article provides an overview of the IRT program, particularly the procedural steps that must be accomplished when undertaking any particular project. First, however, to gain a clearer understanding of the current IRT program, a bit of political history is necessary.

The Evolution of Civil-Military Projects

Early Precursors to the IRT Program

Despite the nation's traditional interest in limiting military involvement in civilian affairs,[7] the armed forces have long contributed to the building of the domestic infrastructure.[8] For example, after Lewis and Clark completed their famous land expedition to the Pacific Ocean, President Thomas Jefferson tasked the Army with surveying the new frontier for future development.[9] Indeed, for awhile West Point served as the nation's only surveying school, and helped train scientists and engineers to design numerous domestic projects for the growing United States.[10] Over the ensuing decades, military personnel helped develop routes for railroads, build civilian parks, sewers, and lighthouses, and engaged themselves in many other domestic projects.[11] In the words of one historian, "[t]hese contributions improved the health and productivity of communities across the nation."[12] One need only look at the continuing role of the Army Corps of Engineers to appreciate the involvement of the military in the building and maintaining of the nation's infrastructure. Until the 1980s, most military involvement in civil projects was limited to special units specifically established just for that purpose. However, the domestic involvement of military units and personnel whose normal role is fighting wars has been another matter entirely.

The stage for greater military involvement in civil projects was set in the New Deal era of President Franklin Roosevelt. In the one hundred days following 4 March 1933, President Roosevelt succeeded in pushing many new federal programs through Congress.[13] Most Americans are familiar with some of these New Deal programs, which sought a greater role for the federal government in building up the nation's infrastructure—programs such as the Works Progress Administration and the Tennessee Valley Authority.[14] However, most would be surprised to learn the depth of military involvement in the New Deal.

One of the most popular New Deal programs was the Civilian Conservation Corps (CCC), an agency set up to hire unemployed young men to plant trees, fight forest fires, build dams, and complete conservation work in the national parks.[15] At first, the U.S. Army was given the minimal role of immunizing CCC participants, issuing them clothing and equipment, and setting up a military-style organization for the CCC camps.[16] Other federal agencies—the Departments of Interior and Agriculture—were given the task of actually commanding the camps.[17] Very quickly, however, the Army was directed to assume "complete and permanent control" of the CCC, and the Army's role grew accordingly.[18] By July 1933, there were a total of 1315 CCC camps in operation, each with "[two] Regular officers, [one] Reserve officer, [and] [four] enlisted men of the Regular Army."[19]

7. *See supra* note 4. The U.S. Supreme Court has echoed this sentiment, noting "a traditional and strong resistance to any military intrusion in civilian affairs." Laird v. Tatum, 408 U.S. 1, 17 (1972). Several U.S. statutes seek to specifically delineate the limits of military involvement in civil affairs. *See, e.g.*, Posse Comitatus Act, 10 U.S.C. § 1385 (2000) (severely limiting military involvement in civilian law enforcement); Stafford Act, 42 U.S.C. §§ 5121-5202 (2000) (outlining the authority of the military to furnish domestic disaster assistance).

8. *See* Tara Rigler, *Army's Legacy More Than National Security*, ARMY NEWS SERV., June 12, 2000, *available at* http://www.dtic.mil/armylink/news/Jun2000/a20000612history.html; IRT Web Site, *supra* note 6.

9. *See* Rigler, *supra* note 8.

10. *See id.*

11. *See id.*

12. *Id.*

13. *See* Walter Johnson, *Franklin Delano Roosevelt*, *in* COLLIER'S ENCYCLOPEDIA CD-ROM: UNABRIDGED TEXT VERSION (1996).

14. *See id.*

15. *See id. See also* James T. Patterson, *Civilian Conservation Corps*, *in* WORLD BOOK MILLENNIUM 2000 CD-ROM (1999).

16. *See* U.S. DEP'T OF ARMY, PAM. 140-14, TWICE THE CITIZEN: A HISTORY OF THE UNITED STATES ARMY RESERVE, 1908-1995, 43 (1997). Following Army structure, the CCC camps were quickly organized into companies of 200 men each. *See id.*

17. *Id.*

18. *Id.* at 44.

19. *Id.*

To augment the Regular Army personnel serving with the CCC, President Roosevelt soon authorized additional members of the Officers' Reserve Corps (ORC) to act as commanders of CCC units.[20] The use of ORC members was seen as a winning situation for all involved: the individual officers often needed the work during the unemployment of the Great Depression, the Army regarded their work as good military training in "practical leadership," Regular Army officers were freed to pursue their customary military duties, and the CCC enrollees had often complained that the Regular Army commanders were "too military."[21] In addition to these advantages, though the CCC camps were racially segregated (with the exception of selected camps in California), black members of the ORC were also given the opportunity to serve on active duty with the CCC, and were even placed in command of all-black units.[22] Given these many benefits, it is not surprising that by the end of fiscal year 1934, the number of Regular Army members on duty with the CCC had dropped to less than 500, while the number of ORC members had risen to nearly 6000.[23] By the end of 1939, it is likely that more than 30,000 ORC members had served on active duty with the CCC,[24] a tremendous diversion of military assets to domestic projects.

On 31 December 1939, the military role in the CCC largely came to an end with President Roosevelt's order that all ORC members were to be placed in civilian status.[25] The CCC itself lasted until Congress abolished it in 1942, by which time more than two million men had served as CCC enrollees.[26] The lessons of such a huge program would not be lost on later politicians, however. President John Kennedy sought to reestablish some form of the CCC before his death, and President Lyndon Johnson revived many of the New Deal efforts with his "Great Society" programs of the 1960s.[27] Later, President Bill Clinton sought to invoke the spirit of the CCC in some of his new initiatives, particularly the AmeriCorps program.[28] Even the military appeared to learn valuable lessons from its CCC experience, for several benefits from that program would clearly be incorporated in its later efforts to establish civil-military programs—particularly the use of Reserve personnel, the emphasis on building the nation's infrastructure while simultaneously bettering the environment, the focus on improving the readiness and training of participants, and the benefits to race relations.

The Department of the Army Domestic Action Program (DADAP)

In 1975, the Army once again sought to formally venture into the realm of civil-military projects. In that year, under the leadership of Secretary Howard "Bo" Callaway, the Army established the Department of the Army Domestic Action Program (DADAP), and issued *Army Regulation (AR) 28-19* to govern its implementation.[29] The DADAP was viewed as "[a]n aggregation of coordinated domestic action activities conducted by all [Army] components to assist local, State, and Federal agencies in the continued improvement and development of society."[30] The focus of the program was to be "directed toward projects which are considered as benefiting the disadvantaged of the civilian community,"[31] including the provision of health and medical support.[32] The more specific goals of the DADAP foreshadow many of the goals of the current IRT program. The following were the specific DADAP goals:

> a. Providing opportunities for cooperative civil/military efforts to foster mutual understanding.

20. *See id.*

21. *Id.*

22. *Id.* at 44-45.

23. *Id.*

24. *Id.* at 45.

25. *Id.*

26. Patterson, *supra* note 15.

27. *See* Adam Karlin, *AmeriCorps Volunteers Aim to Change Community, Campus*, THE DAILY, Feb. 2, 2000.

28. *See id.*

29. *See* U.S. DEP'T OF ARMY, REG. 28-19, DEPARTMENT OF THE ARMY DOMESTIC ACTION PROGRAM (13 Mar. 1975) [hereinafter AR 28-19]; *see also* 138 CONG. REC. S8602 (daily ed. June 23, 1992) (statement of Sen. Nunn). *Army Regulation (AR) 28-19* has since been rescinded. *See infra* note 41 and accompanying text.

30. AR 28-19, *supra* note 29, para. 2.b. Despite this seemingly broad language, *AR 28-19* was just as quick to point out that DADAP did not include certain programs already in existence, such as the use of National Guard personnel for disaster relief. *See id.* para. 3.

31. *Id.* para. 2.b.

32. *See id.* paras. 8-14.

b. Advancing equal opportunity in the Nation and alleviating racial tension.

c. Enriching the civilian economy by transfer of technological advances and manpower skills.

d. Improving the ecological environment and the economic and the social conditions of society.

e. Providing training opportunities for [individual soldiers] and/or units.

f. Providing opportunities for voluntary involvements by military . . . members of the Department of the Army in constructive community, State, and regional projects.

g. Increasing the opportunities for disadvantaged citizens to receive employment, training, education, and recreation.

h. Enhancing individual and unit morale through meaningful community involvement.[33]

In another important foreshadowing, *AR 28-19* also noted that DADAP projects "will not be permitted to interfere with a unit's primary mission," but encouraged commanders "to use *innovative* and creative training techniques to gain or maintain mission *readiness* by integrating domestic action projects into *training* programs."[34] As a final omen, *AR 28-19* noted that "[l]ocal community/military domestic action councils may be constituted to plan possible projects, assess resources available, and determine methods of implementation."[35] These and other tenets of the DADAP would be resurrected in later civil-military programs.

Despite the many prophetic goals of DADAP, *AR 28-19* contained other provisions that were abandoned in later civil-military programs. Perhaps paramount among these provisions was a directive that DADAP was "a decentralized program designed to be implemented at installation and/or unit level."[36] Accompanying this devolution of control, no Army funds were expended for the DADAP program "other than those programmed and used for the training mission."[37] Commanders were merely "authorized and encouraged, within the constraints contained in [*AR 28-19*], to commit their resources to domestic action projects," including the use of assigned or attached personnel, fixed facilities, and transportation assets.[38] Finally, *AR 28-19* included an extensive section dealing with insurance and liability issues. This section included such topics as the Federal Tort Claims Act and formal releases from liability executed by the civilian organizations receiving Army assistance.[39] These liability issues inexplicably would not be addressed in the formal directives governing later civil-military programs.

Perhaps regrettably, the DADAP "had very little management emphasis from the Army's leadership," and as the Army increased its focus on military training in the 1980s, interest in DADAP waned.[40] Finally, on 1 May 1987, the Army ended the DADAP program and rescinded *AR 28-19*.[41] However, "realizing some commands desire[d] to continue their domestic action programs," and noting that "implementation is at the local level," the Army suggested that local commands issue their own internal guidelines governing civil-military projects.[42] In conjunction with this suggestion, the Army mandated that these local regulations must incorporate the following guidelines:

33. *Id.* para. 4.

34. *Id.* para. 5 (emphasis added).

35. *Id.* para. 5.f.

36. *Id.* para. 6. The decentralized character of the DADAP program became even more evident with the first change to *AR 28-19*. In a change effective 30 September 1976, individual commands were no longer required to submit an extensive report on DADAP projects to Army Headquarters via the chain of command. *See* U.S. DEP'T OF ARMY, REG. 28-19, DEPARTMENT OF THE ARMY DOMESTIC ACTION PROGRAM (C1, 31 Jan. 1977). With this change, higher headquarters no longer had a consistent method of monitoring the number and character of DADAP projects. This apparent disadvantage was corrected in the current IRT program. *See infra* notes 195-98 and accompanying text.

37. AR 28-19, *supra* note 29, para. 5.q.2.

38. *Id.* para. 6.

39. *See id.* paras. 15-17. In the opinion of the author, the omission of similar provisions in later civil-military programs was a serious oversight. Liability issues, if anything, have grown more complicated in the twenty-six years since the inception of the DADAP program. Formal guidance on liability issues from the proponents of the current IRT program would certainly help to alleviate the larger concerns today. Liability issues surrounding IRT projects will be revisited in later sections of this article. *See infra* notes 165-168 and accompanying text.

40. 138 CONG. REC. S8602 (daily ed. June 23, 1992) (statement of Sen. Nunn).

41. *See* Message, 091853Z Feb 97, Headquarters, Dep't of Army, DAMO-ODS (9 Feb 1997) [hereinafter DA Message 091853Z Feb 97]; Message, 301333Z Apr 87, Headquarters, Dep't of Army, DAMO-ODS (30 Apr 1987) [hereinafter DA Message 301333Z]; Message, 311520Z Jul 90, Headquarters, Dep't of Army, DAMO-ODS (31 July 1990) [hereinafter DA Message 311520Z Jul 90]. Another Army regulation still in existence, U.S. DEP'T OF ARMY, REG. 360-61, COMMUNITY RELATIONS (15 Jan. 1987), erroneously includes a provision (Section 12-1) that deals with the DADAP and makes reference to the rescinded *AR 28-19*.

42. DA Message 301333Z Apr 87, *supra* note 41.

A. All support must fulfill valid training requirements.

B. Support must be requested by responsible local officials and documentation must be presented certifying that no private or commercial source can provide the support requested from [the Department of Defense (DOD)].

C. Potential private, commercial, state or local sources of support will be further screened by the installation to ensure that the Department of the Army is not in competition with commercial sources of support.

D. Participation in domestic action projects must not selectively endorse, benefit, or favor any person, group, or corporation (whether profit or non-profit); religion, sect, religious or sectarian group, or quasi-religious or ideological movement; political organization; or commercial venture.

E. Support will not impair accomplishment of the installation mission.

F. Individual soldiers . . . must be performing in Military Occupational Specialty (MOS) code related or enhancing activities.

G. Training benefits must accrue to the individuals involved.

H. Requested support must be provided within existing funds used for training missions.

I. Installation commanders will ensure that the local Staff Judge Advocate/Legal Counsel review all proposals.[43]

Finally, the Army stressed once again in its guidance to local commands that "no DOD funds may be used to support" these projects unless "specifically appropriated or support is incidental to a legitimate DOD function such as training."[44] Using these guidelines, local commands constructed their own domestic action programs until the arrival of a new DOD program in 1993. Again, many of the parameters of these locally-generated programs would greatly influence later civil-military programs.

The Civil-Military Cooperative Action Program (CMCAP)

In the summer of 1992, three individuals began to voice separate agendas that would one day meld into a new civil-military program. The first was Senator Sam Nunn (Democrat - Georgia), then serving as Chairman of the Senate Armed Services Committee. In a speech to the Senate on 16 June 1992, Senator Nunn made the following comments:

> [T]he end of the cold war has created a number of opportunities, as well as challenges for our Nation . . . . We are leaving a security era that demanded large numbers of U.S. combat forces stationed overseas or operating in forward locations at high states of combat readiness in order to confront a large and quantitatively superior opponent. That era has ended . . . . [T]here will be a much greater opportunity than in the past to use our military assets and training to assist civilian efforts in critical efforts in critical domestic areas . . . . I do not stand here today proposing any magic solution to the numerous problems we have at home. But I am convinced that there is a proper and important role the armed forces can play in addressing these pressing issues. I believe we can reinvigorate the military's spectrum of capabilities to address such needs as deteriorating infrastructure, the lack of role models for tens of thousands, indeed hundreds of thousands, if not millions, of young people, limited training and education opportunities for the disadvantaged, and serious health and nutrition problems facing many of our citizens, particularly our children. There is a solid precedent for civil cooperation in addressing domestic problems [in the form of] Army Regulation 28-19 . . . . During markup of the National Defense Authorization Act for fiscal year 1993, I intend to offer a proposal to authorize the Armed Forces to engage in appropriate community service programs . . . . [T]he Armed Forces can assist civilian authorities in addressing a significant number of domestic problems.[45]

Senator Nunn soon made good on his promise to introduce a new civil-military program. On 5 August 1992, when introducing the National Defense Authorization Act for Fiscal Year 1993 to the Senate, he noted that the bill—based on the recommendation of the Senate Armed Services Committee—contained "a provision that would establish a Civil-Military Cooperative Action Program[, which] would build upon a variety of past DOD efforts to develop programs that are consistent

43. DA Message 311520Z Jul 90, *supra* note 41. This 1990 message largely repeated the guidance contained in DA Message 301333Z Apr 87, *supra* note 41.

44. DA Message 301333Z Apr 87, *supra* note 41. Once again, the Army acknowledged the importance of both the Posse Comitatus Act and the Stafford Act by noting that "[r]equests for assistance from . . . civil law enforcement agencies, and in response to domestic or manmade disasters are addressed in separate DOD directives and implementing regulations." DA Message 311520Z Jul 90, *supra* note 41. *See also supra* note 7.

45. 138 CONG. REC. S8602 (daily ed. June 23, 1992) (statement of Sen. Nunn).

with the military mission and that can assist in meeting domestic needs."[46] He also noted that the proposed "program would be structured to fill needs not otherwise being met, and to provide this assistance in a manner that does not compete with the private sector or with services provided by other Government agencies."[47]

A second famous voice, the Reverend Jesse Jackson, echoed similar concerns, though at first his idea had nothing to do with the military. During the summer of 1992, Reverend Jackson began trumpeting what he called a "Rebuild America" plan to help poor and disadvantaged citizens as well as rebuild the nation's infrastructure.[48] His plan proposed the creation of a one trillion dollar development bank that would—among other things—be aimed at building bridges and railroads.[49] Reverend Jackson urged all of the major 1992 presidential candidates (President George Bush, Governor Bill Clinton, and Ross Perot) to embrace his plan.[50]

On 23 October 1992, Senator Nunn got his wish when the National Defense Authorization Act for Fiscal Year 1993[51] passed both houses of Congress. The Act, in section 1081, formally established the Civil-Military Cooperative Action Program (CMCAP).[52] The CMCAP would soon be codified temporarily in 10 U.S.C. § 410.[53]

The CMCAP accompanied a list of findings justifying the initiation of the new program. Most of these findings echoed the sentiments of Senator Nunn in his earlier statements on the subject.[54] The objectives of the CMCAP as formally announced by Congress were amazingly similar to the Army's earlier DADAP, which was not surprising considering Senator Nunn's specific reference to that now-defunct program when he introduced the CMCAP concept.[55] The congressional language governing CMCAP even encouraged the use of diverse geographic advisory councils on civil-military cooperation, much as the earlier DADAP program had.[56] Beyond these broad findings and objectives, however, the statute implementing CMCAP contained little guidance for the military services; in particular, the statute did not address funding of the CMCAP program at all, a problem that would obviously vex the military services and individual commands in the ensuing years.[57]

46. 138 CONG. REC. S11826 (daily ed. Aug. 7, 1992) (statement of Sen. Nunn). *See also* S. REP. NO. 102-352 (1992).

47. 138 CONG. REC. S11826.

48. *See Jesse Jackson to Push "Rebuild America" Plan at Democratic National Convention*, N.Y. VOICE, July 4, 1992, at 1. The term "Rebuild America" and accompanying goals were not invented by Reverend Jackson, however. Independent from Reverend Jackson, the "Rebuild America Coalition was founded in 1987 and is composed of a broad group of national public and private organizations committed to the infrastructure challenge—reversing the decline in America's investment in infrastructure and bringing infrastructure investment back to the top of the national agenda." Rebuild America Coalition, *Who We Are—Rebuild America Coalition, at* http://www.rebuildamerica.org/about/index.html (last visited Apr. 25, 2000).

49. *See Jesse Jackson to Push*, *supra* note 48, at 1.

50. *See id.*

51. Pub. L. No. 102-484, 106 Stat. 2315 (1992).

52. *Id.* § 1081 (codified at 10 U.S.C. § 410 (1995) (repealed by Pub. L. No. 104-106, § 571(a)(2), 110 Stat. 353 (1996)). The CMCAP appears to be consistent with the broad, post-Cold War goals of the National Defense Authorization Act for Fiscal Year 1993, for the preamble to the Act noted one of its objectives was "[t]o authorize appropriations . . . for defense conversion." *Id.*

53. *See id.*

54. In hindsight, one of the congressional findings turned out to be overly optimistic:

> As a result of the reductions in the Armed Forces resulting from the ending of the Cold War, the Armed Forces will have fewer overseas deployments and lower operating tempos, and there will be a much greater opportunity than in the past for the Armed Forces to assist civilian efforts to address critical domestic problems.

Id. § 1081(a)(3), 106 Stat. at 2514. The next few years would actually involve an *increase* in overseas deployments and operating tempos, in such hot spots as Somalia, Haiti, Bosnia, and Kosovo. *See* GAO LETTER REP. NO. GAO/NSAID-96-105, MILITARY READINESS: A CLEAR POLICY IS NEEDED TO GUIDE MANAGEMENT OF FREQUENTLY DEPLOYED UNITS (Apr. 8, 1996), *available at* http://www.fas.org/man/gao/ns96105.htm.

55. The verbatim "Program Objectives" of the CMCAP were as follows:

> (1) To enhance individual and unit training and morale in the armed forces through meaningful community involvement of the armed forces.
> (2) To encourage cooperation between civilian and military sectors of society in addressing domestic needs.
> (3) To advance equal opportunity.
> (4) To enrich the civilian economy of the United States through education, training, and transfer of technological advances.
> (5) To improve the environment and economic and social conditions.
> (6) To provide opportunities for disadvantaged citizens of the United States.

10 U.S.C. § 410(b)(1) (repealed 1996). Compare these objectives with the verbatim goals of the Army's earlier DADAP program, *supra* note 33 and accompanying text.

Instead, the statute directed the Secretary of Defense to issue more detailed DOD regulations governing the program,[58] a process that would end up taking several years to accomplish.[59]

At about the same time that the CMCAP legislation was winding its way through Congress, a third personality appeared on the scene trumpeting what would eventually give rise to the comprehensive DOD CMCAP program. In the autumn of 1992, then-presidential candidate Bill Clinton—responding to Jesse Jackson's persistent plea to all of the major candidates—increasingly embraced the "Rebuild America" concept.[60] Upon his election to the presidency in November 1992, he began to offer more concrete terms for the concept, including a proposal for a $200 billion fund to rebuild America's infrastructure.[61] As part of the Rebuild America program, President Clinton soon challenged DOD to search for projects that would both serve American communities in need and provide military training to its units and service members.[62] He also suggested three areas in which DOD resources would be particularly appropriate—health care, infrastructure support, and youth training programs.[63] Though some were extremely critical of President Clinton's Rebuild America concept,[64] local communities across the nation quickly lined up to receive benefits under the proposed program.[65]

In May 1993, the first CMCAP project was accomplished, a joint effort between the State of Texas (through its Department of Health) and the U.S. Army (including active Army, Army Reserve, and Texas Army National Guard assets) to provide medical services for impoverished civilians.[66] The Army, in its after action reports, indicated that the "exercise was an excellent training vehicle" and viewed projects of this type as "valuable for both [the Army] and the nation."[67] In analyzing the lessons learned from this initial project, the Army also

56. *See id.* Continuing the inheritance from the DADAP program, the CMCAP also paid homage to the Posse Comitatus Act, noting that it should not be "construed as authorizing . . . the use of the armed forces for civilian law enforcement purposes." *Id.* § 410(e)(1).

57. *See, e.g.*, Message, 071345Z Feb 94, Commander, U.S. Army Forces Command (FORSCOM), to Dep't of Army Headquarters, Washington, D.C., subject: Civil Military Cooperative Action Programs (7 Feb. 1994) ("Request Departmental guidance concerning recurring initiatives for civil-military cooperative action. The Civil-Military Cooperative Action Program was established by the Defense Authorization Act of 1993. . . . FORSCOM is not aware of any current policy guidance or any funding allocation from DOD for this program . . . .").

58. *See* 10 U.S.C. § 410(b)(1). The statute did place some restrictions on the required DOD regulations, however:

> The regulations shall include the following:
> (1) Rules governing the types of assistance that may be provided.
> (2) Procedures governing the delivery of assistance that ensure, to the maximum extent practicable, that such assistance is provided in conjunction with, rather than separate from, civilian efforts.
> (3) Procedures for appropriate coordination with civilian officials to ensure that the assistance —
> (A) meets a valid need; and
> (B) does not duplicate other available public services.
> (4) Procedures for the provision of assistance in a manner that does not compete with the private sector.
> (5) Procedures to minimize the extent to which Department of Defense resources are applied exclusively to the program.
> (6) Standards to ensure that assistance is provided . . . in a manner that is consistent with the military mission of the units of the armed forces involved in providing the assistance.

Id. § 410(d)(1).

59. Indeed, though a draft version of the regulations would be eventually written, completion of the formal version would not be accomplished before the CMCAP was eventually replaced with the IRT program. However, the draft regulations for the CMCAP program would largely be recycled and finally formalized for the IRT program. See *infra* notes 96-101 and accompanying text for a discussion of the development of DOD regulations for the IRT program.

60. *See* IRT Web Site, *supra* note 6 .

61. *See Clinton's RAF Spurs Questions*, DAILY OKLAHOMAN, Dec. 7, 1992, at 8; William Petroski, *Harkin Sees Opportunity in Clinton's Rebuild America Plan*, DES MOINES REG., Nov. 5, 1992.

62. *See* IRT Web Site, *supra* note 6.

63. *See id.*

64. *See Clinton's RAF Spurs Questions*, *supra* note 61.

65. *See MTC: Bay Area Readies for Clinton's "Rebuild America" Program*, PR NEWSWIRE, Dec. 15, 1992; Petroski, *supra* note 61; Laura Plachecki, *City Seeks Clinton Task Force Money to Build Local Projects*, ARIZ. REPUBLIC/PHOENIX GAZETTE, Jan. 20, 1993, at 2N1; Martin Tolchin, *Mayors Press Clinton on Promise to Rebuild Nation*, N.Y. TIMES, Jan. 25, 1993, at A15.

66. *See* Letter, Office of the Assistant Secretary of the Army for Manpower and Reserve Affairs to Commander, U.S. Army Forces Command, subject: Support of Texas Department of Health Request for Civil-Military Cooperative Action Program (19 Aug. 1993) (on file with author).

67. *Id.*

expressed its hope that the CMCAP process could be more formalized, and noted a need for policies that would standardize the accomplishment of individual projects.[68] The call was obviously out for more specific DOD guidance on how to implement the CMCAP program beyond the broad congressional guidelines.

Responding to this need, in June 1993 the Assistant Secretary of Defense for Reserve Affairs (ASD-RA) established a Directorate for Civil-Military Programs to coordinate with the various components of DOD and to provide guidelines for the CMCAP program.[69] In quick order, the new directorate asked the individual services to develop their own programs consistent with the CMCAP concept, and also asked the two-star chiefs of each service's Reserve component to serve as a General Officer Steering Committee for CMCAP.[70] Finally, the directorate asked these same Reserve chiefs to appoint members at the colonel and Navy captain level to serve on a Senior Working Group, which eventually met regularly from October through December 1993 with the following verbatim tasks:

> 1. Looking at the armed forces' past experience with civil-military projects, both [within the United States and overseas];
> 2. Examining existing resources and capabilities upon which we might capitalize;
> 3. Identifying parameters for new programs based upon this information; and
> 4. Developing new ideas for potential programs through which our armed forces could address domestic needs while simultaneously enhancing readiness. The focus was on quality, not quantity.[71]

The Senior Working Group eventually made recommendations that would help DOD regulate the CMCAP program for the next few years.[72]

In conjunction with the arrival of the CMCAP program, and responding to the Directorate for Civil-Military Program's call for the individual services to establish their own programs consistent with CMCAP, the Army and Marine Corps jointly published identical manuals entitled *Domestic Support Operations*.[73] Chapter 8 of these manuals, entitled *Community Assistance*, paralleled the goals of the CMCAP program[74] while simultaneously providing more detailed guidance to units wishing to undertake such projects.

By early 1994, other CMCAP projects had been accomplished, and positive publicity followed the units participating in them.[75] As a result, requests for assistance began to increase. Despite such helpful developments as the guidelines provided by the Senior Working Group and the Army's and Marine Corps' domestic support operations manuals, the services began to request even more formal guidance from DOD on how to handle these new requests.[76] Accordingly, in September 1994, DOD forwarded a draft directive and instruction on civil-military programs to the individual services for comment; the services in turn disseminated the draft document down the chain of command for similar feedback.[77] At the same time, DOD continued its internal assessment of the CMCAP program, noting several improvements that could be implemented, including:

> Development of project selection criteria which focus on training to guide the services in establishing and implementing projects;

68. *See id.*

69. *See* IRT Web Site, *supra* note 6. Establishment of this directorate was eventually endorsed by the Deputy Secretary of Defense. *See* Memorandum from William J. Perry, Deputy Secretary of Defense, to Assistant Secretary of Defense for Personnel and Readiness, subject: Civil-Military Cooperative Action Program (Nov. 16, 1993). Endorsement of the new directorate at the highest levels of DOD was one of the recommendations of the Senior Working Group, which would soon follow establishment of the directorate. *See infra* notes 71-72 and accompanying text.

70. *See* IRT Web Site, *supra* note 6.

71. *Id.*

72. *See id.*

73. Issued jointly as U.S. DEP'T OF ARMY, FIELD MANUAL 100-19, DOMESTIC SUPPORT OPERATIONS (1 July 1993) [hereinafter FM 100-19] and U.S. MARINE CORPS, FLEET MARINE FORCE MANUAL 7-10, DOMESTIC SUPPORT OPERATIONS (1 July 1993) [hereinafter FMFM 7-10]. Readers should note that FM 100-19 and FMFM 7-10 are still in effect as of this writing and serve as valuable resources for units wishing to pursue IRT projects.

74. "Community assistance activities . . . positively influence public opinion . . . while also enhancing the combat readiness of the organization." *Id.* at 8-1.

75. *See., e.g.*, Bob Haas, *Army Mission: Medicine*, USA TODAY, Mar. 11, 1994.

76. *See, e.g.*, Message, 071345Z Feb 94, Commander, U.S. Army Forces Command (FORSCOM), to Dep't of Army Headquarters, Washington, D.C., subject: Civil Military Cooperative Action Programs (7 Feb. 1994) ("Request Departmental guidance concerning recurring initiatives for civil-military cooperative action. The Civil-Military Cooperative Action Program was established by the Defense Authorization Act of 1993. . . . FORSCOM is not aware of any current policy guidance or any funding allocation from DOD for this program . . . .").

77. *See* Memorandum from Office of the Assistant Secretary of the Army for Manpower and Reserve Affairs to Military Services, subject: Draft Directive and Instruction on Civil-Military Programs) (8 Sept. 1994).

> [d]evelopment of a business case to establish [CMCAP] projects as an alternative and enhancement to regular training activities; [d]evelopment of performance measures to measure success; and [i]dentification of information requirements for program oversight, resource stewardship, and reporting responsibilities.[78]

With these improvements, DOD hoped that "[t]he services [would] have uniform guidelines in selecting, planning, executing, and evaluating [CMCAP] programs, leading to enhanced readiness."[79] Notwithstanding these efforts to standardize and improve the efficiency of the program, imminent political developments—most notably the Congressional elections of 1994—would soon bring an end to CMCAP.

The Innovative Readiness Training (IRT) Program

The Arrival of 10 U.S.C. § 2012

Despite the noble goals of the CMCAP program, a major shortcoming in its basic premise began to emerge. While the statute establishing CMCAP "required DOD to ensure that it provided the assistance in a manner consistent with the military mission of the units involved, the statute did not require an assessment of the training value of providing the assistance."[80] As a result, CMCAP proved to be controversial, with both military and civilian commentators questioning the propriety of the entire program.[81] One pundit neatly summed up the harsh criticism:

> [T]he program weakens the armed forces by diverting time and training to social do-good that is none of the military's function . . . .
>
> By relying on military institutions to perform welfare functions, the administration is not only trying to sneak the welfare state into the armed services but also is trying to use the armed services to import a military structure into the civilian welfare state. The program is thus more appropriate to the regime of North Korea than to a constitutional democracy, and for that reason alone it ought to be abolished.[82]

In 1994, the Republican Party took control of both houses of Congress, and the growing criticism of the CMCAP program began to find sympathy among the new leaders in the legislature.[83] By the spring of 1995, a house committee vote threatened to kill the entire CMCAP program.[84] Responding to this threat, Assistant Secretary of Defense Deborah Lee wrote letters to each of the armed services urging support for the CMCAP program.[85] Her comments included the following: "I am committed to civil-military programs because I know how effective they are -we are fulfilling a commitment to help 'rebuild America' and encourage public service but most importantly we are providing our military personnel valuable 'hands on' training opportunities that enhance readiness."[86] The original champion of CMCAP, Senator Nunn, also rose in defense of the program by making comments before the Senate.[87] Other senators, especially those whose constituents ostensibly benefited the most from CMCAP

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78. The Assistant Secretary of Defense (Reserve Affairs), U.S. Dep't of Defense, Strategic Assessment of the Civil-Military Cooperative Action Program (nd), *available at* http://www.c3i.osd.mil/bpr/bprcd/3402.htm.

79. *Id.*

80. GAO Letter Rep. No. GAO/NSAID-98-84, Civil Military Programs: Stronger Oversight of the Innovative Readiness Program Needed for Better Compliance (Mar. 12, 1998), *available at* http://www.fas.org/man/gao/nsiad98084.htm . The primary motivation behind the CMCAP program is perhaps illustrated by the placement of 10 U.S.C. § 410 under a chapter entitled "Humanitarian and Other Assistance."

81. *See, e.g.*, *Chores for the U.S. Army?*, Wash. Times, May 28, 1995, at B2; Davis, *supra* note 4, at 74, Dunlap, *supra* note 4, at 359.

82. *Chores for the U.S. Army?*, *supra* note 81.

83. The debate over the CMCAP program appears to be part of a wider political debate over the proper role of the military that took place in 1995-96. The wider debate examined such issues as the use of the military for drug interdiction, with presidential candidate Bob Dole pledging an increase in the use of the armed services in the war on drugs and the use of troops for border patrol, and presidential candidate Lamar Alexander calling for the creation of a new branch of the armed forces that would replace the Immigration and Naturalization Service and the Border Patrol, *see* Matthew Carlton Hammond, *The Posse Comitatus Act: A Principle in Need of Renewal*, 75 Wash. U.L.Q. 953, 954 (1997). A particularly sticky issue arose with the DOD joint task force for the 1996 Olympics in Atlanta. Approximately 13,000 troops were deployed for the Olympics at a cost to taxpayers of $51 million. *See* John J. Fialka, *Join the Army to See the World: Drive Athletes Around Atlanta*, Wall St. J., June 12, 1996, at B1. Not all of the troops were used for security purposes; some were used for such mundane tasks as watering field-hockey arenas and driving buses, which led Senator John McCain (Republican-Arizona) to call the assignments "demeaning and degrading" to the troops. *Id.*; *see also Business, Capitol Hill Question Military's Role in Olympics*, Def. Week, July 22, 1996. Newspaper editorials around the nation were generally very critical of the role played by the military in the 1996 Olympics. *See, e.g.*, *Atlanta Storm*, Richmond Times-Dispatch, June 24, 1996, at A6; *Olympic Personnel Carriers*, St. Petersburg Times, May 23, 1996, at 14A. Understanding this wider debate may shed light on the political developments that gave rise to the current IRT program.

84. *See Chores for the U.S. Army?*, *supra* note 81.

85. *See id.*

projects, also spoke up in vehement support to continue the program.[88]

Despite the outcry from these sources, other highly respected political leaders soon expressed concerns about the CMCAP program. Among them was Senator John McCain, who stated the following in remarks to the Senate supporting modification of CMCAP:

> I am concerned when scarce defense dollars are earmarked for these programs that do not significantly enhance national security . . . . I urge the Department of Defense to refrain from requesting funds for these programs in the future since there are so many more pressing military requirements that continue to go unfunded. It is my hope that these programs will continue to provide valuable services to local communities using funds that are more appropriate to their mission.[89]

Eventually, the Senate Armed Services Committee (SASC), in hammering out the DOD budget for Fiscal Year 1996, addressed the growing debate over the CMCAP program. Instead of initially proposing a complete end to the CMCAP program, however, the SASC merely proposed modifications such as restricting the program to the Reserve components, eliminating federal agency labor unions from participation in the advisory councils, and removing management of the program from the ASD-RA.[90] Even these proposed amendments were the subject of intense discussion in the Senate.[91] Eventually, as part of the National Defense Authorization Act for Fiscal Year 1996,[92] Congress passed a compromise measure abolishing the CMCAP program by repealing 10 U.S.C. § 410 and replacing it with 10 U.S.C. § 2012, the Innovative Readiness Training (IRT) program.

Implementation of 10 U.S.C. § 2012 and the Accompanying Regulatory Guidelines

The biggest change from the CMCAP to the IRT program was a new requirement that any civil-military project must first and foremost involve a strong relationship to military training, a topic that will be revisited in greater detail in the next section of this article. Two other mandates in the IRT enabling statute quickly became evident as well. The first was a termination of funding for a centralized office dealing with civil-military programs within the Office of the ASD-RA.[93] This would mean an end to the formal Directorate of Civil-Military Programs that had attempted to formulate policies for the CMCAP program.[94] In conjunction with the demise of a central supervision and policy-making office, the enabling statute mandated that "[t]he Secretary of Defense . . . prescribe regulations governing the provision of assistance" under the IRT program. Congress placed restrictions on these future regulations much as it had done with the CMCAP program.[95]

The regulation which sprang from this mandate, *DOD Directive 1100.20*, assigned the ASD-RA the responsibility to, among other things, "[d]evelop, coordinate, and oversee the implementation of DOD Policy for IRT activities conducted under [10 U.S.C. § 2012,] . . . [s]erve as focal point for all IRT activities[, and] . . . [m]onitor IRT activities."[96] Despite this delegation, the regulation also sought to guide military organizations entering into projects with civilian organizations under 10 U.S.C. § 2012 and established specific processes to ensure the projects would be in conformity with the statute.[97] The reg-

86. *Id.*

87. *See* 141 Cong. Rec. S11557 (daily ed. Aug. 5, 1995) (statement of Sen. Nunn) [hereinafter Sen. Nunn 1995 Statement].

88. *See* 141 Cong. Rec. E1745 (daily ed. Sept. 8, 1995) (statement of Sen. Johnson) (noting the benefits of CMCAP to Indian reservations within Senator Johnson's home state of South Dakota).

89. 141 Cong. Rec. S11557 (daily ed. Aug. 5, 1995) (statement of Sen. McCain).

90. *See* 141 Cong. Rec. S11557 (statement of Sen. Nunn).

91. *See id.*

92. Pub. L. No. 104-106, § 572(a)(1), 110 Stat. 353 (1996).

93. This provision does not appear in the codified version of the IRT statute. It may be found by referencing the original session law, Pub. L. No. 104-106, § 574, 110 Stat. 356 (1996), or by reading the notes following 10 U.S.C. § 2012 in an annotated version of the *U.S. Code*. The exact language of this provision is as follows:

> No funds may be obligated or expended after the date of the enactment of this Act (1) for the office that as of the date of the enactment of this Act is designated, within the Office of the Assistant Secretary of Defense for Reserve Affairs, as the Office of Civil-Military Programs, or (2) for any other entity within the Office of the Secretary of Defense that has an exclusive or principle mission of providing centralized direction for activities under section 2012 or title 10, United States Code . . . .

10 U.S.C.S. § 2012 (2000) (History; Ancillary Laws and Directives).

94. This is not to say that civil-military programs do not get high-level supervision. A two-star general is still listed as the supervisor of these programs. *See* U.S. Air Force, *Biographies*, *at* http://www.af.mil/news/biographies/andrews_je.html (last visited July 16, 2001) (biography of Major General James E. Andrews, USAF).

ulation also required the individual "Secretaries of the Military Departments" to "[p]romulgate guidance consistent with the policies and guidance provided within [*DOD Directive 1100.20.*]"[98] Responding to this requirement, the Air Force published its own internal IRT regulation on 1 March 1999.[99] The Navy followed with its internal IRT regulation on 4 November 1999.[100] Finally, the Army published its internal guidelines on 28 March 2000.[101]

Despite the seemingly positive developments that began to unfold following passage of § 2012, Congress once again began to amend the entire program. In November 1997, as part of the National Defense Authorization Act for Fiscal Year 1998, Congress tasked the General Accounting Office (GAO) with reviewing the IRT program.[102] The GAO's final report was not flattering.[103] For example, it concluded that:

> DOD does not know the full extent and nature of the [IRT] Program because some project information is not consistently compiled and reported. Furthermore, although DOD knows the amount of supplemental funds spent on the program, it does not know the full cost of the program because the services and components do not capture these costs, which are absorbed from their own appropriations.[104]

The GAO report also criticized *DOD Directive 1100.20* for failing to provide additional guidance for military organizations to use in meeting the statutory requirement that the provision of assistance not result in a significant increase in the cost of the training.[105] Finally, the report noted that in some cases individual IRT tasks were not related to military specialties; thus, it appeared that the goal of completing a project sometimes took priority over the goal of providing valid military training.[106]

Congress was not the only body doing follow-up reviews of the IRT program. For example, the Army Internal Review Office conducted its own audit of the Army IRT program in Fiscal Year 1998.[107] The findings of this audit were also critical, noting "cost over runs and disallowed charges totaling over $63,000."[108] The Army auditors made recommendations aimed

95. Actually, the IRT regulatory restrictions enacted by Congress were virtually identical to the earlier CMCAP restrictions. *See supra* note 58 and accompanying text. The only differences being that first, while the CMCAP statute required regulations with "[p]rocedures to *minimize* the extent to which Department of Defense resources are applied exclusively to the program," the IRT statute required regulations with "[p]rocedures to *ensure* that Department of Defense resources are not applied exclusively to the program receiving the assistance," and second, because the IRT statute contained a separate provision requiring a direct link to valid military training, it skipped the CMCAP requirement that future regulations would include "[s]tandards to ensure that assistance is provided . . . in a manner that is consistent with the military mission" of the units providing the assistance. *Compare* 10 U.S.C. § 410 (1995) (repealed 1996) *with* 10 U.S.C. § 2012(f) (2000) (emphasis added).

96. DOD DIR. 1100.20, *supra* note 5, at 6.

97. *See* GAO LETTER REP. NO. GAO/NSAID-98-84, CIVIL MILITARY PROGRAMS: STRONGER OVERSIGHT OF THE INNOVATIVE READINESS PROGRAM NEEDED FOR BETTER COMPLIANCE (Mar. 12, 1998), *available at* http://www.fas.org/man/gao/nsiad98084.htm .

98. DOD DIR. 1100.20, *supra* note 5, at 7.

99. *See* U.S. DEP'T OF AIR FORCE, INSTR. 36-2250, CIVIL-MILITARY INNOVATIVE READINESS TRAINING (IRT) (1 Mar. 1999) [hereinafter AFI 36-2250].

100. *See* U.S. DEP'T OF NAVY, CHIEF OF NAVAL OPERATIONS INSTR. 1571.1, INNOVATIVE READINESS TRAINING (IRT) IN SUPPORT OF ELIGIBLE ORGANIZATIONS AND ACTIVITIES OUTSIDE THE DEPARTMENT OF DEFENSE (4 Nov. 1999) [hereinafter OPNAVINST 1571.1]. This regulation applies only to the Navy, and not to the Marine Corps. Readers should note that the Marine Corps had earlier published *FMFM 7-10*, which dealt with civil-military programs. This manual is still in effect and serves as the Marine Corps' internal guidance. *See supra* note 73 and accompanying text.

101. Memorandum from the Office of the Assistant Secretary of the Army for Manpower and Reserve Affairs, subject: Innovative Readiness Training (IRT) (28 Mar. 2000) [hereinafter Army IRT Policy Memorandum]. Readers should note that the Air Force, Navy, and Army internal guidelines are all available at the IRT Web Site, *supra* note 6. As a final note on the individual service regulations, *DOD Directive 1100.20* itself notes that the IRT program also "applies to . . . the Coast Guard, by agreement with the Department of Transportation, when it is not operating as a Military Service in the Department of the Navy." *See* DOD DIR. 1100.20, *supra* note 5, at 2.

102. *See* Pub. L. No. 105-85, § 595, 111 Stat. 1765 (1997).

103. *See* GAO LETTER REP. NO. GAO/NSAID-98-84, CIVIL MILITARY PROGRAMS: STRONGER OVERSIGHT OF THE INNOVATIVE READINESS PROGRAM NEEDED FOR BETTER COMPLIANCE (Mar. 12, 1998), *available at* http://www.fas.org/man/gao/nsiad98084.htm .

104. *Id.*

105. *See id.*

106. *See id.*

107. *See* OFFICE OF THE ASSISTANT SECRETARY OF THE ARMY, FINANCIAL MANAGEMENT AND COMPTROLLER, SYNOPSIS OF SIGNIFICANT INTERNAL REVIEW REPORTS FY98—VOLUME II, ARMY INTERNAL REVIEW: INNOVATIVE READINESS TRAINING (nd), *available at* http://www.asafm.army.mil/ir/synopsis/fy98/fy98synv2.htm (last visited Aug. 17, 1999).

at "assist[ing] local command[s] in tracking authorized expenses and improving overall project management."[109]

In response to these revelations, the ASD-RA issued two memorandums attempting to provide additional IRT guidance to the military services—particularly in the areas of funding, eligible civilian organizations, and training issues.[110] This was not the end of the matter, however, for Congress also responded to the GAO report by amending 10 U.S.C. § 2012 on 17 October 1998.[111] The amendment added a new section to the IRT statute requiring such measures as after-action reports on all projects, formal certification that each project "would not result in a significant increase in the cost of training,"[112] and more stringent cost accounting.

Understanding the IRT Statutory and Regulatory Guidelines: A Practical Guide for Commanders and Attorneys

Despite the sometimes hectic pace of changes to civil-military programs in general, and the current IRT program in particular, the program has enjoyed some great successes. Military units across the country have participated in projects that have garnered overwhelmingly positive publicity in local, national, and internal media outlets.[113] Some of these projects have involved extended "umbrella" projects that have stretched over several years and have involved cooperation with other military services, as well as other government agencies. Examples include *Operation Walking Shield*,[114] *Coastal America*,[115] and *Operation Alaskan Road*.[116]

Despite the wonderful opportunities offered by these projects, weeding through the IRT statutory and regulatory guidelines can be a daunting task, especially when one considers the many changes the program has undergone. Most military attorneys are unfamiliar with the legal guidelines that govern the program, yet often find themselves having to tackle a legal review of an IRT project on short notice. Add to this the high level of political interest in such projects,[117] and military attorneys face a tough burden. Mastering the complex legal guidelines is therefore critical to an assessment of a particular IRT project. This can be simplified by boiling the IRT legal issues down to fourteen questions that commanders and lawyers should consider when reviewing the propriety of IRT projects. Most of these fourteen issues are addressed in the IRT statute or governing regulations, while a few of them concern basic legal concepts that should not be ignored. By properly addressing these questions, commanders and their supporting attorneys can ensure that IRT projects will survive later scrutiny.

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108. *Id.*

109. *Id.*

110. *See* Memorandums, Assistant Secretary of Defense for Reserve Affairs, subject: Policy Memorandum for Department of Defense (DOD) Innovative Readiness Training (DOD Dir. 1100.20, "Support and Services for Eligible Organizations Outside the Department of Defense") (21 Aug. 1998 and 13 July 1999) [hereinafter ASD-RA IRT Policy Memorandum No. 1 and ASD-RA IRT Policy Memorandum No. 2], *available at* IRT Web Site, *supra* note 6.

111. *See* Pub. L. No. 105-261, § 525(b), 112 Stat. 2014 (1998).

112. 10 U.S.C. § 2012(j)(3) (2000).

113. *See, e.g.*, *Just in Time for Holiday: Cooperative Effort Brings Safe Water Supply to Brundage Colonia*, Dec. 21, 1998 (press release from the Texas Natural Resource Conservation Commission), *available at* http://www.tnrcc.state.tx.us/exec/media/press/12-98brundage.html; Kozaryn, *supra* note 6; Lieutenant Don Marconi, *Naval Reserve Seabees Deploy to Alaska for Readiness Training*, NAVAL RESERVIST NEWS, Oct. 1999, at 5; *Marines Find Unrelenting Foe in Island Road Hurdles*, ANCHORAGE DAILY NEWS, Aug. 11, 1998 (Associated Press release), *available at* http://www.adn.com/stories/T98081168.html; Lieutenant Colonel Randy Pullen, *Dental and Veterinarian Teams at Work*, THE OFFICER, Oct. 1999, at 56; *Reservists Train While Building Low-Income Housing*, A.F. NEWS, Sept. 18, 2000, *available at* http://www.af.mil/news/Sep2000/n20000918_001430.html.

114. Conceived and developed by the Walking Shield American Indian Society for helping to improve the quality of life among Native American people who live on our nation's Indian reservations, while at the same time providing important military training for military Reserve personnel who are involved with the program. *See* IRT Web Site, *supra* note 6 (containing information about this and other umbrella projects).

115. Provides a forum for interagency collaborative action and a mechanism to facilitate regional action plans to protect, preserve, and restore the nation's coastal living resources. *See id.* For further information about the *Coastal America* program, please visit the website dedicated to this program *at* http://www.coastalamerica.gov/text/irt/html.

116. A joint military and community project in the state of Alaska to construct a fourteen-mile road on Annette Island linking the town of Metlakatla to the north side of the island. *See* IRT Website, *supra* note 6.

117. For example, in 1999, the city of New York requested IRT medical support for the New York City Marathon. The letter requesting support was personally signed by Mayor Rudolph Giuliani. *See* Letter, New York Mayor Rudolph Giuliani to Major General William J. Collins, Commanding General, 77th Regional Support Command (Aug. 16, 1999) (on file with author). Also in 1999, DOD IRT participation in the Department of Veterans Affairs (VA) White House Millennium Project—a year-long effort to provide medical care and other services to homeless veterans—was largely initiated by an exchange of letters between the VA's Assistant Secretary for Public and Intergovernmental Affairs and the ASD-RA. *See* Letter, Mr. John Hanson, Assistant Secretary of Veterans Affairs for Public and Intergovernmental Affairs, to Mr. Charles Cragin, Assistant Secretary of Defense for Reserve Affairs (Aug. 19, 1999), and Mr. Cragin's Reply Letter (Aug. 31, 1999).

1. Have You Consulted the Proper Legal Guidelines?

Whenever conducting a review of a proposed IRT project, it is imperative to consult the controlling legal authorities up front. The starting point should always be the IRT enabling statute, 10 U.S.C. § 2012, followed by *DOD Directive 1100.20.* Along with this directive, it is important to consult the additional DOD-level guidance provided in the two policy memorandums issued by ASD-RA.[118] Finally, judge advocates should look to their individual service's regulations dealing with IRT.[119] All of these, with the exception of *FM 100-19* and *FMFM 7-10*, are available on the DOD IRT Website.[120]

2. Is the Requesting Organization Eligible for IRT Support?

Section 2012(e) of the IRT statute is quite clear on which outside entities are eligible for IRT support, stating:

> The following organizations and activities are eligible for assistance . . . :
>
> (1) Any Federal, regional, State, or local government entity.
>
> (2) Youth and charitable organizations specified in section 508 of title 32. [The eligible youth and charitable organizations listed in 32 U.S.C. 508(d) are:
>
> (a) The Boy Scouts of America.
> (b) The Girl Scouts of America.
> (c) The Boys Clubs of America
> (d) The Girls Clubs of America.
> (e) The Young Men's Christian Association.
> (f) The Young Women's Christian Association.
> (g) The Civil Air Patrol.
> (h) The United States Olympic Committee.
> (i) The Special Olympics.
> (j) The Campfire Boys.
> (k) The Campfire Girls.
> (l) The 4-H Club.
> (m) The Police Athletic League.]
>
> (3) Any other entity as may be approved by the Secretary of Defense on a case-by-case basis.[121]

A few notes about these categories are in order. The first category listed broadly allows support to any government entity in the nation. The second category incorporates by reference a similar statute applying to the National Guard. Organizations falling under the first or second categories need only submit the formal request for assistance noted below. If an organization does not fit into the first or second category, the third category allows other entities to request IRT support on a case-by case basis. Any requesting organization or activity, regardless of category, should forward a formal request on official letterhead paper, signed by a responsible official of that organization, to the military unit that the support is requested from.[122] Requests for support under the third category must be forwarded with the IRT packet to the Office of the Assistant Secretary of Defense,[123] and must be accompanied by a copy of the requesting organization's bylaws, and evidence of the organization's non-profit tax status; tax documents that are more than ten years old must have a recertification letter as well.[124]

As a final note, when tackling any IRT project, the military unit involved must ensure that "[r]esources of the Military Departments are not applied exclusively to the program receiving the assistance, and that neither endorsement nor preferential treatment is given to any non-Federal entity as provided in [the *Joint Ethics Regulation*,] *DoD 5500.7-R*."[125] This would preclude, for instance, the use of the participating military unit's name in advertising a non-profit cause for which IRT support was provided.

118. *See supra* note 110 and accompanying text.

119. *See* Army IRT Policy Memorandum, *supra* note 101; FM 100-19, *supra* note 73, ch. 8 (Army); AFI 36-2250, *supra* note 99 (Air Force); OPNAVINST 1571.1, *supra* note 100 (Navy); FMFM 7-10, *supra* note 73, ch. 8 (Marine Corps).

120. IRT Web Site, *supra* note 6. *Field Manual 100-19* and *FMFM7-10* are available at http://www.adtdl.army.mil/cgi-bin/atdl.dll/fm/100-19/fm10019.htm.

121. 10 U.S.C. § 2012(e) (2000).

122. *See id.* § 2012(c)(1); DOD DIR. 1100.20, *supra* note 5, at 3; IRT Web Site, *supra* note 6. "Responsible official" is defined as "an individual authorized to represent the organization or activity regarding the matter of assistance to be provided." DOD DIR. 1100.20, *supra* note 5, at 3-4.

123. The authority to approve these requests on a case-by case basis has been delegated from the Secretary of Defense to the Under Secretary of Defense for Personnel and Readiness (USD(P&R)), and from USD(P&R) to the ASD-RA. *See* DOD DIR. 1100.20, *supra* note 5, at 6, 11.

124. *See* ASD-RA IRT Policy Memorandum No. 2, *supra* note 110.

125. DOD DIR. 1100.20, *supra* note 5, at 5.

3. Is the IRT Project Geographically Located at a Site Eligible for IRT Support?

There are two sub-issues here. First, *DOD Directive 1100.20* strictly limits IRT projects to the following geographic areas: "[T]he United States, its territories and possessions, and the Commonwealth of Puerto Rico."[126] This would preclude IRT projects conducted while on deployment to foreign nations, though other programs might very well be able to accomplish the same thing.[127] Second, the definition of IRT from this same directive states that IRT projects must be conducted "off base in the civilian community."[128] This would presumably curb, for example, the building of a war memorial on a military base for a veterans organization or the provision of medical services to civilians using on-base facilities.

4. Does the Project Sufficiently Involve a Link to Military Training?

This is perhaps the most important legal restriction of all, for Congress took great efforts to ensure the link between valid training and the conduct of civil-military projects when it enacted the IRT statute, plainly stating that IRT projects may be pursued only if "the provision of such assistance is incidental to military training."[129] In this regard, 10 U.S.C. § 2012 is quite specific on what constitutes a legal fulfillment of the training function. The project must:[130]

> A. Involve valid military training. In the case of assistance by an entire unit, the project must accomplish valid unit training requirements. In the case of assistance by an individual [service member], the tasks must be directly related to the specific military occupational specialty of the member.[131]
>
> B. Not adversely affect the quality of the military training.[132]
>
> C. Not result in a significant increase in the cost of training.[133]

Again, a few comments are necessary. First, the requirement of valid unit training "does not apply in a case in which the assistance to be provided consists primarily of military manpower and the total amount of such assistance in the case of a particular project does not exceed 100 man-hours."[134] In such cases, most manpower requests will be met by "volunteers, and . . . any assistance other than manpower will be extremely limited. Government vehicles may be used [in these particular instances], but only to provide transportation of personnel to and from the work site. The use of Government aircraft [in these particular instances] is prohibited."[135]

Second, the potential for adverse affect on the quality of military training is largely a common sense issue. Units should not

126. *Id.* at 3.

127. *See infra* notes 169-74 and accompanying text.

128. DOD DIR. 1100.20, *supra* note 5, at 12.

129. 10 U.S.C. § 2012(a)(2) (2000).

130. *See id.* § 2012(d); DOD DIR. 1100.20, *supra* note 5, at 4.

131. 10 U.S.C. § 2012(d)(A(i)-(ii); DOD DIR. 1100.20, *supra* note 5, at 4. The language of 10 U.S.C. § 2012 is relatively vague in defining military training, and the services have sometimes struggled to determine what constitutes valid training when it comes to IRT projects. Both the DOD regulations and individual service regulations may provide further explanation. For example, *DOD Directive 1100.20* defines "military training" as "[t]he instruction of personnel to enhance their capacity to perform specific military functions and tasks; the exercise of one or more military units conducted to enhance their combat readiness; and the instruction and applied exercises for the acquisition and retention of skills, knowledge, and attitudes required to accomplish military tasks." DOD DIR. 1100.20, *supra* note 5, at 12. This definition should suffice for unit projects, as all of the services rely on this broad definition and repeat the DOD guidance that unit projects must accomplish "valid unit training requirements." *See supra* notes 99-101 and accompanying text. Non-Army units and personnel should note, however, that *DOD Directive 1100.20* and other DOD guidance—perhaps reflecting the Army origins of the IRT program by using Army-centric language—sometimes refer to the "Mission-Essential Task" when defining valid unit training. Though this term is not regularly used in all of the military services, *DOD Directive 1100.20* defines the Mission-Essential Task as "[a] collective task in which an organization must be proficient to accomplish an appropriate portion of its wartime mission(s)." DOD DIR. 1100.20, *supra* note 5, at 13.

In the case of IRT assistance by an individual service member, the definitions must necessarily be more service-specific. The *DOD Directive 1100.20*—again using Army-centric language—states that assistance by an individual service member must "involve tasks directly related to the specific military occupational specialty [MOS] of the member." *Id.* at 4. For Army and Marine Corps personnel, this would entail training within the MOS. *See* Army IRT Policy Memorandum, *supra* note 101; FM 100-19, *supra* note 73; FMFM 7-10, *supra* note 73. For Air Force personnel, this would entail training within the Air Force Specialty Code (AFSC) of the member. *See* AFI 36-2250, *supra* note 99, at 2. For Navy personnel, this would involve training related to the member's Naval Officer Billet Classification (NOBC) or Navy Enlisted Classification (NEC). *See* OPNAVINST 1571.1, *supra* note 100, at 3.

132. 10 U.S.C. § 2012(d)(B).

133. *Id.* § 2012(d)(C).

134. *Id.* § 2012(d)(2); DOD DIR. 1100.20, *supra* note 5, at 4.

trade military training such as participation in war games for a lower quality of training in the civilian community. The Army has given some wise advice along the same lines in its internal IRT regulations: "Commanders must ensure that IRT does not result in task over-training" through repetitiveness.[136]

Finally, Congress has taken the requirement that IRT projects not result in a significant increase in the cost of training so seriously that it now requires each military unit requesting to participate in a particular project to "include an analysis and certification that the proposed project not result in a significant increase in the cost of training."[137] Neither § 2012 nor *DOD Directive 1100.20* explain what constitutes a "significant increase,"[138] but the comprehensive approach taken by the Navy may be of assistance. While DOD merely requires the signature of a flag or general officer certifying that the project will not result in a significant increase in the cost of training,[139] the Navy requires each unit submitting an IRT request to include a detailed cost analysis, providing a template for this report.[140] The Navy report requires a detailed comparison of "training costs" (the Navy's cost if it completed the project without the shared participation of the requesting organization) with "projected project costs" (the Navy's cost with the shared participation of the requesting organization) to arrive at a "savings incurred" figure.[141]

5. Is Your Unit the Proper One To Accomplish the Project?

Although any military unit is theoretically capable of performing an IRT project, *DOD Directive 1100.20* has narrowed the recommended types of units, again through the use of Army-centric language: "IRT activities . . . shall be accomplished *primarily* by combat service support (CSS) units, combat support (CS) units, and personnel *primarily* in the areas of healthcare services, general engineering, and infrastructure support and assistance."[142] The individual service regulations largely echo this language, though the Air Force and Navy guidelines understandably do not use the Army concepts of CSS and CS. Though the DOD guidance clearly opens the *possibility* that purely combat units may participate in IRT projects, the chosen language probably reflects the reality that it would be difficult for combat units to perform valid military training in the civilian community.

Even if a unit determines that it can conduct valid military training, it may not always be the best unit to conduct the particular project. In these cases, awareness of other units in the geographic area—regardless of military service—is a valuable tool in deciding how to best support IRT requests.[143]

6. Have You Ensured that Your Unit Will Not Be Competing Against Private Businesses by Participating in the Project?

The IRT enabling statute and implementing regulations take great pains to ensure that the military will avoid competition with the private sector when performing IRT, even characterizing this goal as a "national policy."[144] In short, IRT may be accomplished only when "the assistance is not reasonably available from a commercial entity"[145] and "[d]oes not dupli-

135. DOD DIR. 1100.20, *supra* note 5, at 4.

136. Army IRT Policy Memorandum, *supra* note 101.

137. 10 U.S.C. § 2012(j)(3).

138. This was a criticism of the GAO in its 1998 review of the IRT program. *See* GAO LETTER REP. NO. GAO/NSAID-98-84, CIVIL MILITARY PROGRAMS: STRONGER OVERSIGHT OF THE INNOVATIVE READINESS PROGRAM NEEDED FOR BETTER COMPLIANCE (Mar. 12, 1998), *available at* http://www.fas.org/man/gao/nsiad98084.htm.

139. *See* OASD-RA IRT Policy Memorandum No. 2, *supra* note 110.

140. *See* OPNAVINST 1571.1, *supra* note 100, at encls. 2 and 3.

141. *See id*. at encl. 3.

142. DOD DIR. 1100.20, *supra* note 5, at 3 (emphasis added). For non-Army units, the *DOD Directive 1100.20* defines CSS and CS in further detail:

> Combat Service Support (CSS). The essential capabilities, functions, activities, and tasks necessary to sustain all elements of operating forces in theater at all levels of war. Within the individual and theater logistic systems, it includes, but is not limited to, that support rendered by Service forces in ensuring the aspects of supply, maintenance, transportation, health services, and other services required by civilian and ground combat troops to permit those units to accomplish their missions in combat. CSS encompasses those activities at all levels of war that produce sustainment to all operating forces on the battlefield.
>
> Combat Support (CS). Fire support and operational assistance provided to combat elements. CS includes artillery, engineer, military police, signal and military intelligence support.

Id. at 11.

143. *See infra* notes 175-77 and accompanying text discussing coordination with other military services and government agencies.

144. DOD DIR. 1100.20, *supra* note 5, at 3.

cate other public sector support or services available within the locale, State, or region where the assistance will occur."[146] When these concerns are present, a unit has two methods of ensuring that no competition problems exist. First, 10 U.S.C. § 2012(c)(2) states that, even if the IRT services are available from a commercial entity, the project may still be pursued if "the official submitting the request for assistance certifies that the commercial entity that would otherwise provide such services has agreed to the provision of such services by the armed forces." An even better assurance would be the inclusion of statements from any business entity that might normally place bids on the particular project, as well as statements from interested labor unions, that they have no objection to military involvement in the IRT project. A second method of ensuring that no competition problem exists comes from *DOD Directive 1100.20*, which states, "The determination of reasonable availability of assistance from a commercial entity may take into account whether the requesting organization or activity would be able, financially or otherwise, to address the specific civic or community need(s) without the assistance of the Armed Forces."[147] A detailed statement along these lines from the requesting organization should suffice in making this determination. Of course, the use of both of these methods in the same request would address the competition issue even more decisively.

7. Does the Project Abide by All Other Laws and Regulations Beyond the IRT Legal Guidelines?

The IRT program is not to be "construed as authorizing . . . the use of Department of Defense personnel or resources for any program, project, or activity that is prohibited by law."[148] At times, the statute and the implementing regulations are even more specific on the types of laws that must be adhered to when performing IRT, particularly those dealing with "the use of the armed forces for civilian law enforcement purposes or for response to natural or manmade disasters."[149] In addition to statutes, *DOD Directive 1100.20* warns that the military services may conduct IRT projects only when they "conform to . . . other applicable Military Department-level instructions, regulations, or policies."[150] Some military regulations make special mention of the IRT program, such as the *DOD Joint Ethics Regulation*.[151] For these reasons, it is vital that an attorney (or perhaps several attorneys within the same military office, such as the operational law attorney, the environmental law attorney, and the ethics counselor) review proposed IRT projects to ensure that other legal restrictions are not contravened.

Two particularly troublesome areas are IRT projects that involve engineering or medical support. Participation by military units in engineering projects raises a host of environmental issues. The starting point for any legal review of these projects should be the environmental impact analysis process required by the National Environmental Policy Act (NEPA).[152] Judge advocates must consult the DOD and service-specific guidance on NEPA when reviewing any IRT involving engineering projects.[153]

Medical projects also face strict external legal guidelines. In fact, *DOD Directive 1100.20* states that military units must:

> [e]nsure, in the case of healthcare assistance, that activities comply with all applicable local, State, Federal, and military requirements governing the qualifications of participating military healthcare providers, and regulating the delivery of healthcare in the particular locale, State or region where a medical IRT activity is to be conducted. The most stringent requirements shall control when a conflict exists.[154]

145. 10 U.S.C. § 2012(c)(2) (2000).

146. DOD DIR. 1100.20, *supra* note 5, at 5.

147. *Id.* at 4.

148. 10 U.S.C. § 2012(i).

149. *Id.* § 2012(i)(1). *See also* DOD DIR. 1100.20, *supra* note 5, at 2. Readers should note, however, that "Civil Affairs (CA), civil disturbance, and disaster-related civil emergency *training* are considered among the type of IRT activities authorized under 10 U.S.C. § 2012." *Id.* at 2 (emphasis added).

150. DOD DIR. 1100.20, *supra* note 5, at 7-8.

151. *See* U.S. DEP'T OF DEFENSE, REG. 5500.7-R, JOINT ETHICS REGULATION, para. 3-211(a)(6) (Aug. 6, 1998).

152. 42 U.S.C. §§ 4321-4370d (2000).

153. *See, e.g.*, U.S. DEP'T OF DEFENSE, DIR. 6050.1, ENVIRONMENTAL EFFECTS IN THE UNITED STATES OF DOD ACTIONS (30 July 1979); U.S. DEP'T OF ARMY, REG. 200-2, ENVIRONMENTAL EFFECTS OF ARMY ACTIONS (23 Dec. 1988); U.S. DEP'T OF NAVY, SECRETARY OF THE NAVY INSTR. 5090.6, EVALUATION OF ENVIRONMENTAL EFFECTS FROM DEPARTMENT OF THE NAVY ACTIONS (26 July 1991); U.S. DEP'T OF NAVY, CHIEF OF NAVAL OPERATIONS INSTR. 5090.1B, ENVIRONMENTAL AND NATURAL RESOURCES PROGRAM MANUAL, CHAPTER 2, PROCEDURES FOR NEPA (1 NOV. 1994); U.S. DEP'T OF AIR FORCE, INSTR. 32-7061, THE ENVIRONMENTAL IMPACT ANALYSIS PROCESS (24 Jan. 1995).

154. DOD DIR. 1100.20, *supra* note 5, at 8.

Accordingly, medical IRT projects require the submission of more detailed information than normal in the requesting packet.[155]

8. Have You Adequately Addressed Funding of the Project?

By this stage, units should have already determined if participation in the IRT project would result in a significant increase in the cost of training. This is not the end of the matter, however. If training issues were the primary concern of Congress when it enacted the IRT statute, then funding issues are surely a close second. Both the IRT statute and the implementing regulations contain detailed oversight and cost accounting procedures that must be followed.[156] These procedures include submission of cost estimates in the original request packet,[157] tracking of costs by the officer in charge, and reconciliation of the costs in the required after-action report that must be submitted upon completion of the IRT.[158] Operations & maintenance (O&M) funding expenditures

> are authorized for expendable readiness training items only. They may include, but are not limited to: fuel; equipment lease; travel; training supplies; and incidental costs to support the training not normally provided for a deployment . . . . IRT O&M funds are not authorized for the payment of civilian manpower contracts ([for example], contracting a civilian labor force to perform duties related to [IRT] activities).[159]

After determining whether the IRT project will significantly increase the cost of training, a unit must decide whether the particular project can be accomplished without supplemental funding. This determination is critical, for it will determine who can approve the project and the deadline for submitting the proposal. Any request for supplemental funding must be submitted through the chain of command for eventual decision by the ASD-RA.[160] Normally, the individual military services have more autonomy in approving IRT projects.[161] In addition, units "shall submit project packages that request [supplemental] IRT funds for the next fiscal year to arrive at OASD-RA no later than [the last day of] February each year."[162] Normally, IRT requests may be submitted at any time during the year.[163] The supplemental funding available for IRT projects is currently $20 million per year, with plans to continue this level of funding through fiscal year 2005.[164]

9. Have You Addressed Liability Issues Surrounding the Project?

Two sub-issues must be addressed here: the liability of the individual service member, and the liability of the government. Section 2012 and the implementing regulations are remarkably silent on these issues, though the Navy's IRT regulation does address liability of medical personnel in great detail.[165] Most liability issues will be governed by the Federal Tort Claims Act (FTCA),[166] which in most cases should protect the individual service member from personal liability for participation in IRT.[167] However, units can ensure that claims do not rise to FTCA litigation by pursuing two remedies from the requesting organization up front: liability insurance and releases from liability. The Department of the Army previously had a superb guide to liability issues as they affected civil-military projects in the form of the now-rescinded *Army Regulation 28-19*. A modified section of that void regulation, though no longer bind-

155. *See infra* note 188 and accompanying text.

156. *See, e.g.*, 10 U.S.C. § 2012(j) (2000).

157. *See infra* note 187 and accompanying text.

158. *See infra* notes 195-98 and accompanying text.

159. OASD-RA IRT Policy Memorandum No. 2, *supra* note 110.

160. *See id.*

161. *See generally id.*; DOD DIR. 1100.20, *supra* note 5.

162. OASD-RA IRT Policy Memorandum No. 2, *supra* note 110.

163. *See id.*

164. *See* E-mail from Colonel Diana Fleek, OASD-RA, to W. Kent Davis (Aug. 23, 1999) (on file with author).

165. *See* OPNAVINST 1571.1, *supra* note 100, at 9, encl. 1.

166. 28 U.S.C. §§ 2671-2680 (2000).

167. For a discussion of the FTCA as it applies to the military service member, see ADMINISTRATIVE AND CIVIL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 241, FEDERAL TORT CLAIMS ACT (Apr. 1998).

ing, still serves as sage advice to units wishing to participate in IRT projects:

> In supporting [IRT] programs, commanders must recognize the possibility of property damage, injury, or death to participants and of [government] liability in this connection. This possibility should not be allowed to limit program support since [the government] is prepared to assume liability and to assist participating [military] personnel in the event of liability claims resulting from their services. Commanders should, however, follow procedures outlined below . . . to insure protection of the interests of [the government] and program participants. . . .
>
> Procedures.
>
> a. Insurance.
>
> (1) *Active [Military] and [Military] Reserve*. Since there is no authority for the [government] to purchase liability insurance, the purchase of liability insurance by the [requesting organization] should be strongly encouraged. Active [Military] and [Military] Reserve personnel may . . . be held personally liable for injury and damage caused by them while participating in [IRT], even though such acts are covered by the Federal Tort Claims Act. The [requesting organization] should be advised that the necessity of liability insurance is to insure full and prompt protection for personnel participating in [IRT] activities. However, [military] participation will not be contingent upon the obtaining of liability insurance unless such insurance is specifically required by other directives or regulations.
>
> (2) . . . *National Guard* . . . . National Guard personnel may be held personally liable for injury and damage caused by them while participating in [IRT], and they are not covered by the Federal Tort Claims Act unless they are called or ordered into active Federal service. For this reason, participation by National Guard units or individuals will not be authorized unless the project sponsor provides liability insurance in an amount satisfactory to the adjutant general concerned.
>
> b. Release of liability. [Requesting organizations] should be encouraged to enter into general releases or agreements with the [government] to save and hold the United States and the members concerned harmless from claims against them in personal injury, death, or damage resulting from activities under this regulation. However, the furnishing of [IRT] support will not be contingent upon the obtaining of general release agreements, unless such agreements are specifically required by other directives or regulations. . . .
>
> Liability. The furnishing of [IRT] support by the [government] is an official function. All [military] personnel participating in such sanctioned support will be considered to be performing an official duty and acting as agents for the [DOD] at such times, whether in a duty or an off-duty status. As such, [military] personnel participating in sanctioned [IRT] activities will be provided the same full assistance in the event of liability claims resulting from their service as they would receive in the event of a similar claim arising out of their performance of any other official function . . . .[168]

168. AR 28-19, *supra* note 29, at 5-6 (rescinded 1987). The following is exemplary language currently recommended by the U.S. Army Reserve Command to its subordinate units for IRT releases from liability:

> The [requesting organization] agrees to:
>
> 1. Release the United States Army Reserve, the [unit] and its subordinate units, its officers, employees, agents, and servants from any claim, demand, damage action, liability, or suit of any nature whatsoever, excluding, however, those arising solely from the intentional torts or gross negligence of the United States Army or its agents.
>
> 2. Indemnify, defend, and hold harmless the United States Army Reserve, the [unit] and its subordinate units, its officers, employees, agents, and servants from any claim, demand, damage action, liability, or suit of any nature whatsoever for or on account of any injury, loss, or damage to any person or property arising from or in any way connected with ongoing IRT missions and support to the agency named below, excluding, however, those arising solely from the intentional torts or gross negligence of the United States Army Reserve or its agents.

See Release and Hold Harmless Agreement, provided by Mr. Richard Smith, Installation Law Attorney at the U.S. Army Reserve Command, Fort McPherson, Georgia (on file with author).

10. Is There Another Military Program Other than IRT that Would Better Address the Project?

Section 2012 clearly expresses Congress's intent that the IRT program is meant to supplement, rather than replace, other means of community participation, stating that "units or individual members of the armed forces . . . [may] provide support and services to non-Department of Defense organizations and activities . . . if . . . such assistance is authorized by a provision of law (other than this section)."[169] In these cases, the IRT restrictions—particularly the required link to military training—do not necessarily apply.[170] Perhaps the most common alternative to IRT are "customary community relations and public affairs activities" noted in the IRT statute itself,[171] which are governed by *DOD Directive 5410.18* and *DOD Instruction 5410.19*, as well as individual service regulations.[172] Determining whether a project should be conducted as IRT or community relations is sometimes difficult, but the key is remembering the primary focus of IRT: military training. Put another way, if the main focus of the project is the conduct of military training, then IRT is the appropriate program. If military training is not the primary focus, and the main impetus is benefit to the requesting organization, then community relations is probably the appropriate program.[173] If a project does not fit neatly into either the IRT or community relations programs, a host of other laws permit community participation.[174]

11. Have You Coordinated with Other Military Services or Other Government Agencies, Especially for Joint Projects?

The *DOD Directive 1100.20* requires that all IRT projects "[b]e coordinated among the Military Departments and other Federal, State, and local agencies to avoid duplication."[175] As mentioned above, units often participate in joint projects when conducting IRT. In these cases, ASD-RA policy states that units are responsible for "[c]oordinating with other Service/Component POCs participating in the project (to include gathering final project costs for After Action Reports)."[176] Even in cases where no other military service assistance is requested, it is wise to determine if another military unit could better support the request.[177]

169. 10 U.S.C. § 2012(a) (2000).

170. *See generally id.* § 2012(a)(2).

171. *Id.* § 2012(b)(1).

172. *See, e.g.*, AR 360-61, *supra* note 41; U.S. DEP'T OF NAVY, SECRETARY OF THE NAVY INSTR. 5720.44A, DEPARTMENT OF THE NAVY, PUBLIC AFFAIRS POLICY AND REGULATIONS (3 June 1987); U.S. DEP'T OF NAVY, CHIEF OF NAVAL OPERATIONS INSTR. 5350.6A, NAVY COMMUNITY SERVICE PROGRAM (19 July 1994); U.S. DEP'T OF NAVY, CHIEF OF NAVAL OPERATIONS INSTR. 5760.5B, NAVY SUPPORT AND ASSISTANCE TO NATIONALLY ORGANIZED YOUTH GROUPS (22 Nov. 1994); U.S. DEP'T OF NAVY, CHIEF OF NAVAL OPERATIONS INSTR. 5760.2C., POLICY AND RESPONSIBILITY FOR NAVY YOUTH PROGRAMS AND NAVY SUPPORTED YOUTH ORGANIZATIONS (20 Dec. 1985).

173. This is not the end of the analysis if a particular project is to be undertaken as community relations. *Department of Defense Directive 5410.18* defines the community relations program as:

> Any planned and executed action by a DOD Component, unit, or person, designed to achieve and maintain good relations with all of the various publics with which it interacts. Such a program can be conducted on or off a military reservation. Community relations programs are conducted at all levels of command, both in the United States and overseas. Community relations programs include, but are not limited to such activities as:
> a. Armed Forces participation in international, national, regional, State and local public events;
> b. Installation open houses, tours and embarkations in naval vessels and military aircraft;
> c. Cooperation with Government officials and community leaders;
> d. Aerial demonstrations and static display of aircraft;
> e. Encouragement of Armed Forces personnel and their dependents to participate in all appropriate aspects of local community life.
> f. Liaison and cooperation with labor, veterans and other organizations and their local affiliates at all levels;
> g. Liaison and cooperation with industry and with industrial, technical and trade associations; and
> h. Provision of speakers.

U.S. DEP'T OF DEFENSE, DIR. 5410.18, COMMUNITY RELATIONS, para. 3-2 (3 July 1974).

174. The following are just a few examples. The Interservice and Intragovernmental Support Program allows military units to provide support to other military services and other federal agencies. *See* U.S. DEP'T OF DEFENSE, INSTR. 4000-19, INTERSERVICE AND INTRAGOVERNMENTAL SUPPORT (9 Aug. 1995). The Sponsored Unit Program allows Selected Reserve "units to affiliate with civilian or nonmilitary governmental organizations to perform inactive duty training (IDT). This training is intended to improve the quality and readiness of the individual soldier and unit, thus enabling enhancement of individual and unit efficiency and preparedness for military operations." Commonly used to train medical personnel in civilian hospitals, this program has counterparts in the other services. *See* U.S. DEP'T OF ARMY, REG. 140-1, ARMY RESERVE MISSION, ORGANIZATION, AND TRAINING, ch. 6 (1 Sept. 1994); *see also* 10 U.S.C.S. § 4301 (LEXIS 2000). The Adopt-a-School Program allows military units to form partnerships with local schools and provide tutoring and other services to children. *See* Department of Defense Appropriations Act, 1990, Pub. L. No. 101-165, § 91111, 103 Stat. 112. There are alternate names for this program, such as the Army's Partnerships with Schools and the Navy's Personal Excellence Partnership program. Finally, the Donation of Computer Equipment Program allows the transfer of DOD computer hardware to civilian schools. *See* Exec. Order No. 12,999, 61 Fed. Reg. 17,227 (Apr. 17, 1996). *See generally* NAVY COMMUNITY SERVICE PROGRAM, NAVY PERSONNEL COMMAND, COMMUNITY SERVICE GUIDEBOOK (nd) (discussing many of these programs), *available at* http://www.bupers.navy.mil/pers605/index.html (Navy Community Service Program Web site).

175. DOD DIR. 1100.20, *supra* note 5, at 3.

12. Have You Made Use of the Appropriate Public Affairs Assets, Including IRT Advisory Councils?

Though training is the primary focus of IRT, there is nothing that precludes incidental benefits to the military. One benefit often overlooked in IRT projects is the positive publicity that results from participation in community projects. From this publicity flows tremendous goodwill in the civilian community as well as important recruiting opportunities. Commanders and attorneys should ensure the public affairs officer (PAO) is involved from the beginning in any IRT project. In turn, the PAO should turn these projects into external press releases, internal stories, and other marketing tools.

Another public affairs tool is the use of diverse advisory councils to help plan IRT projects. The IRT statute itself encourages the use of these assets and suggests their composition:

> The Secretary of Defense shall encourage the establishment of advisory councils at regional, State, and local levels, as appropriate, in order to obtain recommendations and guidance concerning [IRT] assistance . . . from persons who are knowledgeable about regional, State, and local conditions and needs . . . . The advisory councils should include officials from relevant military organizations, representatives of appropriate local, State, and Federal agencies, representatives of civic and social service organizations, business representatives, and labor representatives.[178]

13. Have You Assembled the IRT Request Packet Correctly and Made Plans To Forward It to the Proper Officials?

Once a unit has addressed all of the preceding twelve concerns, it is time to assemble a formal IRT packet and submit it through the chain of command to the appropriate approval authority. The following items must be included:

(1) A formal request from the unit for approval to conduct an IRT project, in the format approved by ASD-RA. A sample letter in the ASD-RA format is available on the DOD IRT Website.[179] This letter must include two mandatory items or risk automatic rejection: (a) a certification that the project will not result in a significant increase in the cost of training;[180] and (b) the signature of a flag or general officer.[181]

(2) The original letter from the requesting organization asking for IRT support, signed by a responsible official of that organization.[182] For requesting organizations not automatically entitled to IRT support under 10 U.S.C. § 2012(e)(1) or (2), and seeking approval on a case-by case basis under § 2012(e)(3), the original request must be accompanied by a copy of the requesting organization's bylaws and current evidence of the organization's non-profit tax status.[183]

(3) Environmental documentation for IRT engineering projects.[184]

(4) Proof of liability insurance and/or release from liability if obtained from the requesting organization.[185]

(5) Identification of an officer in charge of the project.[186]

(6) Review and endorsement of the proposal by the following military officials:

(a) Staff judge advocate or legal officer;

(b) United States property and fiscal officer (USPFO) or federal budget officer responsible for obligating and disbursing federal funding to verify that:

176. IRT Web Site, *supra* note 6.

177. *See supra* note 143 and accompanying text.

178. 10 U.S.C. § 2012(h) (2000). *See also* DOD DIR. 1100.20, *supra* note 5, at 5.

179. *See* IRT Web Site, *supra* note 6. Navy units may find a sample specifically tailored to their needs by examining enclosure (2) of OPNAVINST 1571.1, *supra* note 100.

180. *See supra* notes 137-41 and accompanying text.

181. *See supra* note 139 and accompanying text.

182. *See supra* note 122 and accompanying text.

183. *See supra* notes 123-24 and accompanying text.

184. *See supra* notes 152-53 and accompanying text.

185. *See supra* note 168 and accompanying text.

186. *See* IRT Web Site, *supra* note 6. The duties of the officer in charge of the IRT project are discussed *infra* notes 195-98 and accompanying text.

(1) Supplies and equipment items are on the Government Services Administration (GSA) schedule or local purchase and that the prices are fair and reasonable;

(2) The estimated cost for each project is delineated by operations and maintenance (O&M) and pay and allowances (P&A) for each service or component participating; and

(3) Fiscal accountability is in accordance with current comptroller directives.

(c) Plans, operations, and training officials; and

(d) Inter-governmental agencies (if participating or having an interest in the IRT project).[187]

(7) For medical projects, the IRT packet must include even more detailed information.[188]

Once the packet is assembled, the final approval authority must be determined. The ASD-RA, though now the DOD approval authority for IRT projects, has delegated this authority to the individual services in most cases. Under current ASD-RA policies, only two types of projects must be submitted to ASD-RA for approval: (1) those projects in which the requesting organization is not automatically entitled to IRT support under 10 U.S.C. § 2012(e)(1) or (2) and is seeking approval on a case-by case basis under § 2012(e)(3);[189] and (2) those projects requesting supplemental funding or reallocation of IRT funds from another IRT project.[190] All other projects may be approved by the individual services under the DOD-level guidelines. However, the individual services have taken different approaches to further delegate this authority.

The Army is perhaps the most permissive in its approach. It has delegated its approval authority to "commanders of Major Commands (MACOMs)," and "to streamline the approval process," considers "the Army National Guard and Office, Chief Army Reserve" to be MACOMs for IRT purposes.[191] The Army even allows the MACOMs to further delegate approval authority to commanders of major subordinate commands, but no further than that level.[192] The Air Force has taken a more cautious approach, resting its approval authority with the Deputy Assistant Secretary for Reserve Affairs.[193] The Navy has taken a similar approach by resting the same IRT approval authority with the Chief of Naval Operations.[194]

14. Do You Have an Officer in Charge Who Can Supervise and Track the Project for Filing of an Appropriate After-Action Report?

Once approved, the unit is not quite finished with the legal requirements. Section 2012 requires that units "[p]rovide for oversight of project execution to ensure that [the IRT] project . . . is carried out in accordance with the proposal for that project as approved."[195] The ASD-RA seeks to ensure adherence to this provision by requiring each unit participating in an IRT project to appoint an officer in charge of the project.[196] The primary duties of the officer in charge, besides project oversight, are obtaining all of the required documents for submission of the IRT packet, coordination with all organizations participat-

187. *See* IRT Web Site, *supra* note 6.

188. In these cases, the packet must identify the governing body of the federal, regional, state, or local civilian health organization (CHO) that agrees to all IRT activities performed by military personnel. The CHO must then certify that the project: (1) accommodates an identified underserved healthcare need that is not being met by current public or private sector assistance, including a description of the criteria used to identify the medically underserved community and the specific services they require; and (2) is provided in a manner that does not compete with private sector medical, dental, or healthcare assistance in the underserved area.

In addition, the CHO must verify and identify the agent (whether military or civilian) who will be responsible for compliance with the following during the IRT: (1) medical waste handling and disposal; (2) Clinical Laboratory Improvement Act (CLIA); (3) credentialing and privileging of military health care providers to include basic life support and, if applicable, advance trauma and cardiac requirement; (4) emergency evacuation of a "real life incident;" (5) follow-up care of patients for continuity of care; and (6) handling of patients' records for continuity of care and Privacy Act issues.

Finally, medical IRT projects must ensure that all participating military personnel: (1) in direct contact with the patient population, use universal body substance isolation precautions as developed by the Center for Disease Control and Occupational Safety and Health; (2) have completed required immunizations (to include Hepatitis B series) in accordance with their service regulations; (3) have a current negative Human Immunodeficiency Virus (HIV) test in accordance with their service regulations. *See* IRT Web Site, *supra* note 6.

189. *See* DOD DIR. 1100.20, *supra* note 5, at 8.

190. *See supra* notes 160-64 and accompanying text.

191. Army IRT Policy Memorandum, *supra* note 101.

192. *See id.*

193. *See* AFI 36-2250, *supra* note 99, at 2-3.

194. *See* OPNAVINST 1571.1, *supra* note 100, at 5.

195. 10 U.S.C. § 2012(j)(5) (2000).

196. *See* IRT Web Site, *supra* note 6.

ing in the project, and gathering of data for the after action report (AAR).[197]

An AAR must be submitted to ASD-RA no later than sixty days after completion of the project. When more than one military service or government agency is participating in the project, participating units must forward their AAR information to the project lead agent no later than thirty days after project completion. The AAR submitted to ASD-RA must contain the following information:

> (1) The project name, location, and dates of accomplishment.
> (2) A breakdown of the number of military participants in each grade category by service or component and unit.
> (3) A list of the types of services performed, accompanied by numerical data such as the number of man-hours performed on the particular service or the number of patients seen.
> (4) A breakdown of all fiscal obligations (O&M and P&A) used to support the entire project. The breakdown must delineate ASD-RA funding obligations from service or component funding obligations if supplemental funding was approved for the project.
> (5) Information about any media or public affairs activities and community, state, or congressional involvement.
> (6) Any other relevant information.[198]

Conclusion

The IRT program, having arrived in 1996 as the descendant of other civil-military programs, is growing in size as word reaches military units and civilian organizations eligible to participate in it. The legal parameters controlling the IRT program are complex and seemingly in a state of constant development. While it has presented incredible opportunities for both military training and public affairs, not to mention the incidental benefits to civilian communities, IRT has at times been subject to intense outside scrutiny. For these many reasons, it is imperative that commanders and attorneys understand the statutory and regulatory provisions governing IRT. By examining the fourteen points outlined in this article, units participating in IRT should be able to avoid the legal pitfalls and reap a training and public affairs windfall.

197. *See id.*

198. *See id.* For an excellent sample format for the AAR, see OPNAVINST 1571.1, *supra* note 100, encl. 4. Units should also be aware of one further follow-up action regarding IRT projects—the treatment of each service member's participation in such projects for evaluation and selection board purposes. In the 1997 amendments to the IRT statute, Congress added the following guidance on this topic:

> (g) Treatment of member's participation in provision of support or services.
> (1) The Secretary of a military department may not require or request a member of the armed forces to submit for consideration by a selection board (including a promotion board, command selection board, or any other kind of selection board) evidence of the member's participation in the provision of support and services to non-Department of Defense organizations and activities under this section or the member's involvement in, or support of, other community relations and public affairs activities of the armed forces.
> (2) Paragraph (1) does not prevent a selection board from considering material submitted voluntarily by a member of the armed forces which provides evidence of the participation of that member or another member in activities described in that paragraph.

10 U.S.C. § 2012(g) (2000) (codifying Pub. L. No. 105-85, § 594, 111 Stat. 1764 (1997)).

TJAGSA Practice Note

Faculty, The Judge Advocate General's School, U.S. Army

Contract & Fiscal Law Note

Make Your Friends "Green" With Envy Environmental Law Basics For Installation Contract Law Personnel

Introduction

Today's military emphasizes "buying green;" that is, acquiring goods and services that are "friendly" to the environment. Today's military also emphasizes administering contracts in an environmentally conscious way. Because of this emphasis, many environmental traps exist for the installation contracting officer and the contract law attorney. In fact, there are probably more environmental surprises for the contract law attorney than there are contracting surprises for the environmental law attorney. This note highlights basic environmental law concepts relevant to the contracting process to help contracting personnel avoid falling into those traps.

This note analyzes the basics of environmental contracting at both the formation and administration stages. It focuses on the formation stage because that is where most environmental contracting requirements exist. The note discusses several environmental statutes which contracting officers and their legal advisors must understand when analyzing contracting issues. The note will not discuss clean up and restoration of environmentally damaged sites, but will focus on basic environmental issues present in routine contract actions. The note concludes with a checklist of environmental issues for contracting officers and contract law attorneys to consider when analyzing prospective and existing contracts.

Background

Congress often implements its social policies through its government contracting rules and regulations. For example, Congress requires the government to show a preference for small business contractors.[1] Like its small business preferences, Congress also implements its environmental policies through its government contracting rules and regulations. Running through these contracting rules and regulations are two overarching environmental themes: (1) eliminating hazardous substances from procured goods and services; and, (2) using recycled materials to the maximum extent practical. These two environmental themes are present during both contract formation and contract administration.

Formation

Generally speaking, contracting officers shall promote full and open competition through the use of competitive procedures in soliciting offers and awarding government contracts.[2] When specifying their needs, agencies must draft specifications that permit full and open competition and include restrictive provisions only to the extent necessary to meet the minimum needs of the agency or as permitted by law.[3] Therefore, the general requirement of full and open competition must sometimes give way to particular agency needs or to statutory and regulatory exceptions.

Such particular agency needs and legal exceptions often arise out of environmental issues. When analyzing how to comply with environmental preference requirements, one of the simplest solutions is to restrict competition to those sources that can supply items meeting the environmental requirements. This could occur either through full and open competition after exclusion of sources, or through simply specifying needs that eliminate a pool of contractors who cannot meet the environmental requirements.

Contracting officers may therefore restrict competition in order to further environmental goals.[4] The authority for this restricted competition derives from *Executive Order 13,123, Greening the Government Through Efficient Energy Management*, which challenges agencies to promote the increased use of "energy-savings performance contracts."[5] Likewise, *Executive Order 13,101, Greening the Government Through Waste Prevention, Recycling, and Federal Acquisition*, also restricts competition by requiring agencies to procure recycled and environmentally sound products.[6] This order expresses a strong federal policy that justifies use of environmental specifications

1. The Small Business Act, 15 U.S.C. §§ 631-650 (2000); GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 19.201 (June 1997) [hereinafter FAR]; *see also*, H&F Enters., B-251581.2, July 13, 1993, 93-2 CPD ¶ 16 (approving federal policy of preserving inner cities by limiting competition for leased office space to cities with "inner cities.").

2. 10 U.S.C. § 2304(a)(1) (2000); 41 U.S.C. § 253(a)(1) (2000); FAR, *supra* note 1, subpt. 6.1.

3. 10 U.S.C. § 2305(a)(1); 41 U.S.C. § 253a(a); FAR, *supra* note 1, at 10.002.

4. *See, e.g.*, American Can Co., B-187658, Mar. 17, 1977, 77-1 CPD ¶ 196 (upholding requirement for reclaimed fiber content).

5. Exec. Order No. 13,123, 64 Fed. Reg. 30,851 (June 3, 1999).

that may narrow the competition for federal requirements.[7] In fact, contracting officers may draft specifications that are more environmentally restrictive than required by law.[8] Moreover, the GAO normally will not disturb a government decision to restrict competition for environmental reasons even when a protester alleges that the required product actually harms the environment.[9]

Having established that contracting officers may narrow competition, how do they actually do so? They do so primarily by considering energy conservation and efficiency data when developing purchase requests and solicitations.[10] They accomplish this by: (1) using product descriptions and specifications that reflect cost-effective use of recycled products, recovered materials, remanufactured products, and energy-efficient goods and services;[11] (2) requiring offerors to certify the percentage of recovered materials used when the agency awards contracts at least partially on the basis of use of recovered materials;[12] and, (3) using life-cycle cost analysis whenever possible to assist in making source selection decisions.[13]

Use of these energy conservation and efficiency factors is mandated. *Executive Order 13,148, Greening the Government Through Leadership in Environmental Management*, requires agency heads to integrate environmental accountability into daily decision-making and long-term planning.[14] Moreover, contracting officers must develop a Preference Program to implement these mandates.[15] Preference Programs must: (1) provide open competition between products made of virgin materials and products containing recovered materials and provide a preference to the latter; or (2) establish minimum content standards that identify the minimum content of recovered materials that an item must contain.[16]

To help establish Preference Programs, the Environmental Protection Agency has established five "guiding principles" for contracting officers to use when building environmental preferences into their acquisitions.[17] Those principles are: (1) considering environmental factors as a routine part of the acquisition; (2) rooting environmental purchasing strategies in the "ethic of pollution prevention;" (3) considering the life-cycle stages of a product or service; (4) comparing the environmental impacts of competing products and services to select the one that is most environmentally preferable; and (5) gathering comprehensive, accurate, and meaningful information about the environmental performance of products or services.[18]

Along with developing Preference Programs using the EPA's guiding principles, agencies must also develop Affirmative Procurement Programs.[19] Each Affirmative Procurement Program must ensure that agencies purchase items composed of recovered materials to the maximum extent possible.[20] To

6. Exec. Order No. 13,101, 63 Fed. Reg. 49,643 (Sept. 14, 1998). The final rule implementing Executive Order 13,101 increased the contracting officer's authority and specifically applied the order to simplified acquisitions. Federal Acquisition Circular 97-18; Introduction, 65 Fed. Reg. 36,012 (June 6, 2000).

7. *See* American Can Co., 77-1 CPD ¶ 196; Quality Lawn Maint., B-270690, June 27, 1996, 96-1 CPD ¶ 289; Integrated Forest Mgmt., B-204106, Jan. 4, 1982, 82-1 CPD ¶ 6.

8. Trilectron Indus., B-248475, Aug. 27, 1992, 92-2 CPD ¶ 130.

9. *See* Integrated Forest Mgmt., B-204106, Jan. 4, 1982, 82-1 CPD ¶ 6.

10. Office of Federal Procurement Policy, Policy Letter 92-4: Procurement of Environmentally-Sound and Energy-Efficient Products and Services, para. 6(a), 57 Fed. Reg. 53,362 (Nov. 9, 1992) [hereinafter Policy Letter 92-4]; FAR, *supra* note 1, at 7.103. Agencies must also develop and promote biobased products and bioenergy to the extent possible. Exec. Order No. 13,134, 64 Fed. Reg. 44,639 (Aug. 12, 1999). Biobased products are products that use renewable agricultural or forestry materials. *Id*. Bioenergy is energy generated by any organic matter available on a renewable basis. *Id*.

11. *See* Exec. Order No. 13,101, § 501, 63 Fed. Reg. at 49,647; Policy Letter 92-4, *supra* note 10, para. 7a(4), 57 Fed. Reg. at 53,362; FAR, *supra* note 1, at 23.401(b).

12. 42 U.S.C. § 962c(3)(A) (2000); Policy Letter 92-4, *supra* note 10, para. 7a(6), 57 Fed. Reg. at 53,362; FAR, *supra* note 1, at 52.223-4, -9.

13. Policy Letter 92-4, *supra* note 10, para. 7a(3), 57 Fed. Reg. at 53,362.

14. 65 Fed. Reg. 24,595 (Apr. 22, 2000).

15. 42 U.S.C. § 6962(i)(3); Policy Letter 92-4, *supra* note 10, para. c(1)(e), 57 Fed. Reg. at 53,362. For detailed information regarding practicing environmentally preferable purchasing, see Office of Pollution Prevention and Toxics, Environmental Protection Agency, *Environmentally Preferable Purchasing*, *at* http://www.epa.gov/oppt/epp/sitemap.htm (last visited July 10, 2001).

16. 42 U.S.C. § 6962(i)(3); Policy Letter 92-4, *supra* note 10, para. c(1)(e), 57 Fed. Reg. at 53,362.

17. Office of Pollution Prevention and Toxics, Environmental Protection Agency, *Environmentally Preferable Purchasing*, *at* http://www.epa.gov/oppt/epp/fivegp.htm (last visited July 10, 2001).

18. *Id*.

19. 42 U.S.C. § 6962(i); Exec. Order No. 13,101, 63 Fed. Reg. 49,643 (Sept. 14, 1998); Policy Letter 92-4, *supra* note 10, para. 7c, 57 Fed. Reg. at 53,362; 40 C.F.R. § 247.6 (2000).

ensure this, the Environmental Protection Agency has listed many products containing recycled materials that agencies must try to purchase.[21] These products include engine coolants, cement, traffic cones, playground equipment, garden hoses, and plastic trash bags.[22] Installation contract law attorneys would be wise to review proposed contracts to determine if they contain any of these items. However, although contracting officers must purchase items that contain these recycled materials, this requirement only applies to procurements over $10,000, or where the purchased quantity of such items procured in the fiscal year exceeds $10,000.[23]

As with many government requirements, there are exceptions to the Affirmative Procurement Program. Under the Resource Conservation and Recovery Act (RCRA),[24] the contracting officer may deviate from the EPA list if the procured items: (1) are not reasonably available within a reasonable period of time; (2) fail to meet the performance standards set forth in the specifications or fail to meet the reasonable performance standards of the procuring agency; or (3) are only available at an unreasonable price.[25]

Along with these general environmental guidelines, contracting officers must also be aware of some specific environmental mandates. For example, the President has required all agencies to purchase energy efficient computer equipment.[26] When purchasing motor vehicles, installations must select "clean fuel" or "alternate fuel" vehicles.[27] Furthermore, each agency must reduce its vehicles' fuel consumption by certain targeted percentages.[28] Finally, installations should ensure that they do not award contracts to vendors who have been convicted of a criminal violation of the Clean Air Act (CAA) or Clean Water Act (CWA).[29]

Contracting officers and their installation contract law attorneys must therefore keep several environmental considerations in mind during the contract formation stage.

Administration

Contracting officers and their installation contract law attorneys must also keep several environmental considerations in mind during the contract administration stage. Though not as extensive as the formation list, the list of environmental issues during contract administration is also extensive. Contracting officers and their attorneys must continue to "think green" during the administration stage.

To comply with the Emergency Planning and Community Right-to-Know Act (EPCRA) of 1986,[30] installations must provide local officials information on the storage and use of hazardous chemicals affecting the local community.[31] Installations must also establish reporting and notification requirements to assist state and local governments in their efforts to prepare for an emergency caused by the release of hazardous chemicals.[32]

Consistent with fiscal law principles, contracting officers must also ensure that all environmental costs are allowable and allocable to the contract,[33] and funded with the right "color of

20. 42 U.S.C. § 6962(i).

21. 40 C.F.R. §§ 247.10-247.17 (2000). These products are organized by paper and paper products, vehicular products, construction products, transportation products, park and recreation products, landscaping products, non-paper office products, and miscellaneous products. *Id*. Agencies must also use paper with a minimum of 30% recycled content. Exec. Order 13,101, § 505, 63 Fed. Reg. at 49,649. For additional information on qualifying products, see the U.S. Environmental Protection Agency, Office of Pollution, Prevention and Toxics' Web site at http://www.epa.gov/oppt/epp/database.htm.

22. Exec. Order No. 13,101, § 505, 63 Fed. Reg. at 49,649.

23. *Id*. The $10,000 per-fiscal-year amount is the aggregate of all purchases within the agency, for that guideline item, each fiscal year. 42 U.S.C. § 6962(a). *See generally* Policy Letter 92-4, *supra* note 10, 57 Fed. Reg. 53,362.

24. 42 U.S.C. §§ 6901-6991(h).

25. *Id*. § 6962(c)(1)(A)-(C); FAR, *supra* note 1, at 23.404(b)(1)-(3).

26. Exec. Order No. 13,123, § 403(b), 64 Fed. Reg. 30,851, 30,854-55 (June 3, 1999).

27. 42 U.S.C. § 7588.

28. Exec. Order No. 13,149, 65 Fed. Reg. 24,607 (Apr. 21, 2000).

29. U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 209.405(b) (Apr. 1, 1984) [hereinafter DFARS]; *see also* Major Louis A. Chiarella et. al., *Contract and Fiscal Law Developments-The Year in Review*, ARMY LAW., Jan. 2001, at 76. The Clean Air Act is codified at 42 U.S.C. §§ 7401-7671q. The Clean Water Act is codified at 33 U.S.C. §§ 1251-1387 (2000).

30. 42 U.S.C. §§ 11001-11050.

31. *Id*. §§ 11021-11022.

32. *Id*. §§ 11003-11004.

money." Installations fund environmental compliance with operation and maintenance (O&M) funds, environmental restoration accounts,[34] and specific statutory spending authority.[35]

Installation contracting officers and their attorneys must therefore be aware of the many environmental issues present during contract administration.

Environmental Statutes

There are several environmental statutes that contracting officers and contract attorneys must understand when analyzing contract issues. Although contract law attorneys and contracting officers do not need to become experts in these statutes, they should at least be aware of their existence and understand their basic impact on the procurement process.

Congress passed the National Environmental Policy Act (NEPA)[36] so that agencies would conduct a thorough analysis of the likely environmental impacts of their proposed actions before taking those actions. For installation contracting officials, NEPA may require an Environmental Assessment and an Environmental Impact Statement before carrying out a proposed contract. The CWA[37] may also impact installation contracting actions. Worded very broadly, the CWA prohibits anyone, including the government, from discharging pollutants into navigable waters without a permit.[38] Permit requirements are especially stringent for agencies when working with wetlands. Like the CWA, the Safe Drinking Water Act (SDWA)[39] protects surface water supplies. Unlike the CWA, however, the SDWA also protects groundwater supplies. Procurement officials must therefore be aware of these statutes when contracting for goods or services that trigger these statutory requirements.

Closely related to the SDWA and the CWA is the CAA.[40] The CAA requires all "sources" of pollutants (including the government) to meet air quality standards. Installations must also protect their cultural resources, including historic properties and Native American sites within their borders.[41] Finally, installation contracting activities must avoid harming endangered animals and plants. The Endangered Species Act[42] and the Sikes Act[43] require the military to manage the natural resources at installations to provide for "sustained multiple purpose uses" and public access "necessary or appropriate to those uses."[44]

Although not an exhaustive list of relevant environmental statutes, these citations should give installation contracting personnel an idea of how environmental laws can permeate many proposed and existing contracts.

Conclusion

There are many environmental traps for installation contracting personnel. Through a basic familiarity with environmental laws and regulations, however, contracting officers and contract attorneys can assure environmental compliance for their contracting programs. The mantra for all installation contracting personnel should be "think green" at all stages of the contracting process. Major Siemietkowski and Major Walker.

33. FAR, *supra* note 1, at 31.201-2.

34. 10 U.S.C. § 2703 (2000).

35. For example, see the Noise Control Act of 1972, 42 U.S.C. § 4901.

36. 42 U.S.C. §§ 4321-4370d.

37. 33 U.S.C. §§ 1251-1387 (2000).

38. The EPA administers the CWA through an extensive permitting system.

39. 42 U.S.C. §§ 300f to 300j-26.

40. *Id.* §§ 7401-7671q.

41. *See* National Historic Preservation Act, 16 U.S.C. § 470 (2000); Archeological Resources Protection Act, *id.* § 470aa; Antiquities Act, *id.* §§ 431-433; Archeological and Historic Preservation Act, *id.* § 469; Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (2000); American Indian Religious Freedom Act, 42 U.S.C. § 1996. All of these statutes impose requirements that may impact on the federal agency or its contractors.

42. 16 U.S.C. §§ 1531-1544.

43. *Id.* §§ 670a-f.

44. *Id*.

Appendix: Environmental Compliance Checklist[45]

The breadth of environmental issues impacting on contracting actions can be overwhelming. What follows is a suggested checklist for installation contracting officers and contract law attorneys to consider when reviewing contract actions for environmental compliance. CAUTION! This is not an exclusive list of possible environmental issues. Contract law attorneys should consult their environmental law experts when they think they have spotted an environmental issue in a contract.

Section I—General Contract Procedures for Environmental Issues

1. References. Ensure availability of the following reference tools:

a. Statutes: Resource Conservation and Recovery Act, 42 U.S.C. § 6962

b. Executive Orders: Executive Order 13,101, Greening the Government

c. Policy Letters: Office of Federal Procurement (OFPP) Policy Letter 92-4, Procurement of Environmentally Sound and Energy Efficient Products and Services

d. Federal Acquisition Regulation (FAR)

2. Acquisition Planning.

a. Has the activity considered all environmental issues as part of the acquisition planning for the buy? These issues include requirements to procure recycled and environmentally sound products. Executive Order 13,101, § 410; FAR pt. 7.

b. Has the contracting officer conducted market research to obtain information on the availability of environmentally sound products and services that meet the agency needs? FAR 10.001.

c. Has the contracting officer conducted a market survey to find sources for environmentally sound products and services? FAR 7.101.

3. Drafting Specifications.

a. Has the activity chosen the procurement method (sealed bidding versus negotiated acquisition) that best promotes the environmental factors for the acquisition?

b. Has the activity defined adequately its minimum needs to include, where appropriate, environmental factors?

c. Where appropriate, has the activity included relevant performance specifications? OFPP Policy Letter 91-2.

d. Do the specifications promote full and open competition without being unduly restrictive?

e. If the specifications limit competition, do they promote a collateral policy of protecting the environment? *See* Quality Lawn Maint., B-270690, June 27, 1996, 96-1 CPD ¶ 289; Integrated Forest Mgmt., B-204106, Jan. 4, 1982, 92-1 CPD ¶ 6; American Can Co., B-187658, Mar. 17, 1977, 77-1 CPD ¶ 196.

4. Responsibility and Award.

a. Do the evaluation factors in the solicitation consider:

(1) The offeror's overall environmental stewardship?

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45. Students of the Environmental Contracting elective, 48th Graduate Course, The Judge Advocate General's School, U.S. Army, compiled the original version of this checklist, under the direction of Lieutenant Colonel (then Major) Mary Beth Harney, United States Air Force.

(2) The offeror's past performance to determine if the offeror is environmentally competent? *See* Fed. Envtl. Services, B-250135, May 24, 1993, 93-1 CPD ¶ 398.

(3) The offeror's ability to find, evaluate, and obtain environmentally sound products and services?

b. Has the contracting officer made a determination of the bidder's overall responsibility by considering the general responsibility factors in FAR 9.1?

(1) Has the contracting officer conducted a pre-award survey?

(2) Has the contracting officer considered the bidder's past environmental performance record, such as observing environmental standards, using environmentally sound products and services, and minimizing environmental damage? *See* Standard Tank Cleaning, B-245364, Jan. 2, 1992, 92-1 CPD ¶ 3.

c. Is the bidder or offeror on the GSA list of Parties Excluded from Federal Procurement and Nonprocurement Programs? (For criminal violations of the Clean Air Act and Clean Water Act.) *See* DFARS 209.405(b).

Section II: Substantive Areas

1. Ozone-Depleting Substances (ODS).

a. References.

(1) National Defense Authorization Act for FY 1993, Pub. L. No. 102-484, §§ 325-326.

(2) Executive Order 12,843, 58 Fed. Reg. 21,881 (1993), Procurement Policies and Requirements for Federal Agencies for Ozone-Depleting Substances.

b. Contract Screening.

(1) Does the contract contain a military specification (MILSPEC) or standard that requires the use of a Class I ODS or can only be met through the use of an ODS?

(2) If the contract does contain a MILSPEC or standard requiring the use of an ODS, has the contracting officer forwarded the file to the Approved Technical Representative (ATR) for review?

c. Approved Technical Representative Review.

(1) Did the ATR find that the contract does not require ODS? If so, did the ATR forward the file back to the contracting officer for processing?

(2) Did the ATR find that the contract does require ODS? If so, did the ATR forward the file back to the contracting officer with direction to amend the solicitation? Did the ATR include a certification in the file stating that either an ODS substitute exists or no known ODS substitute exists?

(3) Upon receiving the file from the ATR, did the contracting officer amend the solicitation to remove the use of ODS?

(4) If the contracting officer did not amend the solicitation to remove the use of ODS, did the contracting officer request a waiver from the Senior Acquisition Official?

d. Waiver and Senior Acquisition Official Review.

(1) Did the SAO review the solicitation and waiver request to determine whether or not a suitable substitute for the ODS is available?

(2) Is the waiver request submitted to negate a specific prohibition against using ODS? If so, the waiver request is improper.

(3) Is the ODS available off-the-shelf? If so, a waiver is not required.

2. Affirmative Procurement.

a. References.

(1) Resource Conservation and Recovery Act, 42 U.S.C. § 6962.

(2) Executive Order 13,101, Greening the Government.

(3) OFPP Policy Letter 92-4, Procurement of Environmentally Sound and Energy Efficient Products and Services.

(4) Environmental Protection Agency Comprehensive Procurement Guidelines.

(5) Environmental Protection Agency Guidance on Environmentally Preferable Purchasing, 64 Fed. Reg. 45,810 (1999).

b. Has the contracting officer considered the purchase of environmentally preferable products as part of the procurement? 42 U.S.C. § 6962; FAR 23.403.

c. Are the specifications drafted to comply with the goals of affirmative procurement? *See* OFPP Policy Letter 92-4. Review the specifications for the following points:

(1) Whether the specifications exclude improperly the use of recovered materials;

(2) Whether the specifications do not unnecessarily require the item to be manufactured from virgin materials; and

(3) Whether the specifications require the use of recovered materials to the maximum extent practicable without jeopardizing the end use of the item.

d. Does the value of the procurement exceed $10,000? If so, has the contracting officer complied with the requirement to purchase EPA Comprehensive Procurement Guideline items?

e. If the contracting officer has not complied with the EPA Comprehensive Procurement Guideline items, does an exception apply, which is documented in the contract file? *See* 42 U.S.C. § 6901. The exceptions are as follows:

(1) The items are not available in a reasonable period of time;

(2) The items fail to meet the performance standards in the specifications or fail to meet the reasonable performance standards of the procuring agencies;

(3) The items are available only at an unreasonable price; or

(4) The items are not available from a sufficient number of sources to maintain a satisfactory level of competition.

f. Has the contracting officer considered the EPA's Guidance on Environmentally Preferable Purchasing during the solicitation process? *See* 64 Fed. Reg. 45,810 (1999). The five key principles from the EPA's Guidance are as follows:

(1) Agencies should consider environmental factors as a routine part of the acquisition;

(2) Agencies should ground their environmental purchasing strategies in the "ethic of pollution prevention" by reducing waste and pollution at the source;

(3) Agencies should consider life-cycle costs of a product or service to determine its overall positive and negative environmental impact;

(4) Agencies should compare the environmental impacts of competing products and services to select the one that is most environmentally preferable; and

(5) Agencies should gather comprehensive information about the environmental performance of products and services.

3. Environmental Clean-Up.

a. References.

(1) Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9670.

(2) Defense Environmental Restoration Program, 10 U.S.C. § 2701.

(3) Executive Order 12,580.

(4) Resource Conservation and Recovery Act, 42 U.S.C. § 6901.

b. Does the solicitation contain requirements for environmental clean-up?

c. Has the CERCLA environmental response action process been completed? This includes the following procedures:

(1) Removal process;

(2) Remedial action process;

(3) Remedial investigation;

(4) Feasibility study;

(5) Proposed plan;

(6) Responsiveness summary;

(7) Record of decision;

(8) Remedial design; and

(9) Remedial action.

d. Is there any potential regulatory overlap between CERCLA and RCRA that may impact the solicitation?

e. Have all potentially responsible parties (PRP) under CERCLA been identified? *See* Cheryl Lynch Nilsson, *Defense Contractor Recovery of Cleanup Costs at Contractor Owned and Operated Facilities*, 38 A.F. L. REV. 1 (1994). These include the following:

(1) Current owners and operators of the facility (current owners and operators);

(2) Former owners and operators of the facility during the time any hazardous substance was disposed of at the facility (former owners and operators);

(3) Persons who arranged for the disposal or treatment of hazardous substances that they owned or possessed at a facility (generators and arrangers); and

(4) Persons who accepted hazardous substances for transport to disposal or treatment facilities (transporters).

Preparation Tips for the Deployment of a Brigade Operational Law Team (BOLT)

This is the second in a series of CLAMO notes discussing tactics, techniques, and procedures (TTP) for a Brigade Operational Law Team (BOLT) preparing to deploy to the Joint Readiness Training Center (JRTC). These TTPs are based on the observations and experiences of Operational Law (OPLAW) Observer-Controllers (OCs) at the JRTC. The JRTC OPLAW OC Team suggests a four-stage "battle-focused training" approach to BOLT preparation for a JRTC rotation. This training first prepares the individual BOLT member, transitions to prepare the BOLT as a whole, then prepares the brigade staff, and finally focuses on the entire brigade task force. These training steps should prove useful to BOLTs preparing for a JRTC rotation.

A deployment to one of the combat training centers (CTC) provides a BOLT with a rare opportunity to train with the brigade task force. All too often, the concept of teamwork within the BOLT takes a backseat as the judge advocate (JA) struggles to stay on top of the ever-increasing number of legal issues. The JA dispatches his senior legal non-commissioned officer (SLNCO) to find food and transportation, and to "take the night shift" in the Tactical Operations Center (TOC). Lacking guidance from the JA and SLNCO, the one legal specialist who accompanies the team achieves the top seven "Minesweeper" scores on the Rucksack Deployable Law Office and Library (RDL) laptop computer before being pulled by the brigade S-1 to work in the Administration & Logistics Center (ALOC). After fourteen days of exhaustion and frustration, the BOLT returns to home station having "survived" a training rotation, but never coming together as a team to solve the challenges of identifying, confronting, and quickly resolving the host of legal issues that overwhelmed them.

Brigade JAs often overlook that doctrine calls for an Operational Law *Team* at the brigade level,[1] and that effective coordination, training, and use of the team members can increase the BOLT's effectiveness (and thereby reduce the JA's stress) by an order of magnitude. This note explores the development of a BOLT training plan designed to build an effective team poised for a successful rotation at the JRTC.

To create a BOLT training plan, the JA and SLNCO should begin by analyzing the BOLT's mission and gain an understanding of all the tasks they must be able to accomplish (a Mission Essential Task Lists, or METL).[2] Next, the BOLT leadership must identify BOLT personnel and assess their proficiency at METL and individual tasks.[3] Finally, the team must be organized, trained, and resourced to accomplish the BOLT's mission and METL. Throughout this process, the JA and SLNCO must have the guidance and approval of the Office of the Staff Judge Advocate (OSJA) leadership—the SJA, DSJA, CLNCO, and Legal Administrator. The input and endorsement of the OSJA leadership is critical to the training plan's soundness and execution.

BOLT Mission and METL

The BOLT's mission is to provide professional legal services within the brigade throughout the range of military operations.[4] With this mission, a BOLT develops its METL—those tasks a BOLT must be able to accomplish to provide effective legal services to the brigade. A BOLT's METL relevant to a contingency deployment may contain some of the following tasks:

> (1) Provide Command Legal Advice and Services;
> (2) Plan and Provide Legal Services to Soldiers;
> (3) Plan and Conduct International Law Operations; and
> (4) Deploy and Sustain Operational Readiness.[5]

Each METL task contains a number of subtasks defining how the BOLT will accomplish the METL task. For instance, "Plan and Provide Legal Services to Soldiers" may include the following subtasks for a BOLT:

> (1) Provide legal advice and services on trusts and estates;
> (2) Provide legal advice and services on family law;

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1. U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS 5-21 (1 Mar. 2000) [hereinafter FM 27-100].

2. *Id.* at 4-32. *See also* U.S. DEP'T OF ARMY, FIELD MANUAL 25-100, TRAIN THE FORCE 3-1 (15 Nov. 1988) [hereinafter FM 25-100].

3. FM 27-100, *supra* note 1, at 4-32.

4. *Id.* at vii.

5. *Id. at* 4-34.

(3) Provide legal advice and services on civilian criminal matters; and
(4) Understand and implement a preventive law program.

Subtasks are drawn from the Judge Advocate General's Corps (JAGC) doctrine, higher OSJA requirements, and brigade plans and standing operating procedures (SOP).[6] The team should also examine the specific mission to anticipate operation-specific tasks.[7]

With a thorough understanding of the BOLT METL and constituent subtasks, the JA and SLNCO can best determine what personnel they will need, how to task-organize them, and what training the team requires. The METL tasks should drive the training plan, forcing the JA and SLNCO to envision how METL tasks will be performed in the field, who will perform them, and what training is needed to achieve proficiency.

BOLT Composition

A BOLT is typically comprised of a JA, a SLNCO, and three to five legal specialists, depending on the number of battalions within the brigade combat team.[8] The JA is the chief of the BOLT, assisted by the SLNCO.[9] In garrison, the JA and SLNCO normally interact with only those legal specialists assigned to the brigade's organic maneuver battalions. The legal specialists assigned to battalions providing slice elements to the BCT (such as artillery, engineer, and support battalions) often work in their corresponding consolidated legal centers (such as division artillery and division support command) or in the main OSJA. Without an existing habitual relationship with these other legal specialists, the JA and SLNCO must organize and train the entire team well in advance of the rotation to function effectively on deployment. This may prove challenging due to other work requirements. Uniting these legal specialists from different legal centers for team-building and collective training is virtually impossible without strong support from the OSJA leadership.

When possible, BOLTs should deploy the entire team assigned to the task force, rather than only one or two legal specialists. As any JA who has been through a CTC rotation will attest, there is more than enough work to challenge a JA in a few days—the challenge lies in using all assets to their full potential. Unfortunately, many units leave some legal specialists behind in garrison legal centers, depriving both the BOLT of their service and the soldiers of a rare and valuable training opportunity. This also denies the battalion an opportunity to exercise its own systems in a deployed environment and downplays the importance of legal support. Finally, failure to deploy legal specialists assigned to the battalions signals to the battalion and brigade leaders that legal support may be unnecessary in operations at that level.

BOLT Organization and Employment

Once METL tasks are understood and deploying personnel identified, the training plan should explain the employment and necessary resourcing of BOLT personnel. These decisions are driven by METT-T[10] and the JA's & SLNCO's coordination with the legal specialists' parent units.

The BOLT should plan to occupy a location as close as possible to the nerve center of current and future operations to participate in mission planning and react with timely advice to legal issues as they arise. The BOLT should be present in the TOC, with the commander and primary staff.[11] Depending on the mission, the JA may need to move with the brigade TAC (forward command post) or even the Command & Control vehicle or aircraft.[12] In any case, the JA should be positioned to provide legal advice to the command at all times.[13]

Failure to effectively locate, organize, and appropriately employ legal specialists causes significant challenges in delivering effective legal services during a brigade deployment. Judge advocates and SLNCOs must evaluate several variables before task organizing legal specialists to maximize their value to the BOLT and the brigade. These concerns include the strength, training, and experience of the legal specialists, the

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6. U.S. Dep't of Army, Field Manual 25-101, Battle Focused Training 2-3 (30 Sept. 1990) [hereinafter FM 25-101].

7. For an example of a systematic approach to anticipate legal issues, see TJAGSA Note, International and Operational Law Division, *A Problem Solving Model for Developing Operational Law Proficiency: An Analytical Tool for Managing the Complex*, Army Law., Sept. 1998, at 36 (describing "Legal Preparation of the Battlefield").

8. FM 27-100, *supra* note 1, at 5-21.

9. *Id.*

10. METT-T stands for: Mission, Enemy, Terrain, Troops, and Time available—an acronym for the various factors considered during operation planning and execution. U.S. Dep't of Army, Field Manual 101-5-1, Operational Terms and Graphics 1-102 (30 Sept. 1997).

11. FM 27-100, *supra* note 1, at 5-22.

12. *Id*. at 5-23.

13. *Id*. at 5-22 through 5-24.

nature of the mission, the brigade's operational methods, and the understanding and willingness of the brigade and battalion staffs to use legal personnel in their doctrinal roles.

The SLNCO is normally at his most effective when co-located with the JA in the TOC. Being in the TOC allows the SLNCO to rotate shifts with the JA to provide twenty-four-hour legal coverage, to monitor all incoming information, and to communicate with any subordinate unit and legal specialist. Though not authorized to provide legal advice, the SLNCO generally has the training and experience to recognize legal issues arising during operational planning and execution.[14] Finally, locating the SLNCO at the TOC provides continuity in the event that the JA conducts battlefield circulation or becomes a casualty.

Legal specialists should augment the team at the TOC, assisting the JA and SLNCO with the many procedural aspects of operational law, including preparation of investigations, military justice, and claims actions. These legal specialists log the legal actions and communicate with both higher and subordinate units to deliver legal support. The TOC legal specialists benefit from their close coordination with the JA and SLNCO and gain perspective and training on the full range of operational legal issues affecting the task force. In turn, the JA and SLNCO owe their personnel at the TOC full training value for their work by including them in the military decision making process and introducing them to the legal issues the JA cell must spot during operations.

Other legal specialists may be detailed to provide legal support to subordinate headquarters such as maneuver battalions (for example, investigations of fratricides, law of war violations, and other serious incidents) and the support battalion (enemy prisoner of war (EPW) treatment, contracting, civilian requests for food, and supplies). Placing legal specialists at subordinate battalions provides the battalions with legal support at their level and facilitates communication with the JA when necessary. A legal specialist operating independently at the subordinate level carries significant responsibility as he is the BOLT's sole representative at a headquarters where a significant amount of legal work may occur. These legal specialists must have the trust and support of the JA and the officers and NCOs at their location and be well trained in both military occupational specialty (MOS) and soldier skills. Tasks that battalion legal specialists may be expected to perform include:

(1) Providing procedural advice and administrative support to investigating officers;
(2) Preparing military justice procedural matters through a completed Article 32 investigation;
(3) Conducting "Team Village" outreach visits;
(4) Investigating and processing claims for submission to a claims commission;
(5) Battle-tracking in the battalion TOC to spot legal issues;
(6) Monitoring battalion combat trains for EPWs and fratricide reports; and
(7) Disseminating and training rules of engagement (ROE).

A significant concern the BOLT training plan must address is the use of legal specialists by other senior NCOs and officers to perform non-legal functions. At times, legal specialists become the S-1's driver or perform permanent TOC security detail and are no longer under the BOLT's control. This can occur at both the brigade and battalion level, though the latter is more likely as the JA and SLNCO are not present to protect the legal specialist from performing non-legal duties.

As members of the brigade, BOLT personnel should contribute to the same extent as other headquarters personnel. This means that everyone may pull their share of guard duty, may courier documents, or may perform other duties common to TOC personnel. However, do not confuse helping the overall team with abdicating MOS-specific work. The JA and SLNCO must ensure the unit S-1 and S-3 understand that legal personnel work for the BOLT and deploy to perform MOS-specific training and work. If a battalion staff tasks a BOLT asset with non-legal functions to the point where he cannot fulfill his primary mission, the JA and SLNCO should coordinate with the battalion staff to resolve the problem. If that fails, the BOLT should bring the problem to the attention of the brigade executive officer and command sergeant major or the SJA for resolution.

BOLT Training

With the BOLT personnel identified, their roles in units secured, and a defined mission and METL, the JA and SLNCO must ensure that the team members are trained to accomplish their tasks. The JA and SLNCO are the team's chief trainers, with the JA ultimately responsible for training the team and the SLNCO ensuring each soldier is proficient at individual and collective tasks.[15] The BOLT training goals must focus on mission accomplishment, soldier readiness, and the six core legal disciplines (military justice, international law, administrative law, civil law, claims, and legal assistance).[16]

Individual training includes fieldcraft and any special training required of all soldiers in the unit (such as airborne, air

14. *See* U.S. DEP'T OF ARMY, SOLDIER TRAINING PUB. 12-71D15-SM-TG, LEGAL SPECIALIST (Oct. 1997) [hereinafter LEGAL SPECIALIST].

15. FM 25-101, *supra* note 6, at 1-2.

16. FM 27-100, *supra* note 1, at viii.

assault, and similar training). All personnel should be able to perform tasks common to all soldiers. All legal specialists should also be able to process military justice documents, intake claims, and perform all other MOS-specific tasks.[17] The JA and SLNCO should also know about special capabilities and limitations within the team, such as special weapons qualification, jumpmaster certification, foreign language fluency, and others. Awareness of these types of skills gives the BOLT flexibility to pursue its own mission as well as other brigade missions as circumstances arise.

Collective training synchronizes team members' individual efforts while accomplishing METL tasks. For example, analyzing a mission operations order (OPORD) in a time-constrained environment is often a collective task, requiring a team effort. At the JRTC, the BOLT must conduct mission analysis within a few hours after receipt of a new OPORD. As the JA attends the division briefing and studies the base order to gain an understanding of the overall mission and any specified and implied tasks impacting the BOLT, the SLNCO and legal specialists may analyze the order for ROE. The SLNCO distills the ROE annex for mission-specific ROE and details the legal specialists to comb through other annexes for ROE hidden in battlefield operating systems (BOS)-specific coordinating instructions. One specialist may check the fire support annex, another the close air support annex, a third the civil-military operations annex, and so on. Each specialist lists particular ROE accompanied by a citation to annex and paragraph. Meanwhile, the JA identifies ROE dissemination and certification of 100% ROE training to the division as tasks for the BOLT. The SLNCO compiles the ROE lists and reviews them with the JA to determine the extent of ROE dissemination and additional training required.

The BOLT's collective task is to analyze a division OPORD. To accomplish this collective task in a time-constrained environment, each BOLT member must be trained to perform the following individual tasks:

> (1) Identify basic principles of the *Chairman of the Joint Chiefs of Staff* (JCS) *Standing Rules of Engagement* (SROE);
> (2) Know baseline ROE applicable to the brigade prior to OPORD receipt (from prior OPORDs, tactical SOPs, or home-station ROE training);
> (3) Identify BOS-specific ROE; and
> (4) Understand how to read an OPORD.

Additionally, the JA and SLNCO must be able to identify those OPORD paragraphs containing implied tasks for the BOLT.

A training plan addresses these requirements by scheduling a series of classes and practical exercises. One class focuses on the JCS SROE and an understanding of the brigade's baseline ROE, while another class describes how to read an OPORD. Each class concludes with a practical exercise to ensure that the BOLT members understand what ROE and OPORDs look like. A final session reviews the BOLT members' responsibilities upon OPORD receipt, with a practical exercise requiring a complete OPORD analysis, to prepare the JA for a mission analysis brief. By training these and other METL tasks with the team, the JA and SLNCO ensure that the BOLT can handle everything it may face while deployed with the brigade.

Accomplishing collective BOLT training is often difficult and usually hindered by a variety of training distracters. These distracters typically come in the form of personnel ownership issues and garrison mission requirements. Judge advocates must address these distracters, as they erode deployment effectiveness and degrade readiness. A well thought-out and approved training plan will mitigate these distracters. The BOLT should create a training plan, present the plan to the JAGC leadership, gain their support, make necessary changes, implement the plan, and protect training time.

BOLT Resourcing

Preparing the team not only includes training team members, but also preparing the team's resources. The BOLT should inventory the team's assets and prepare resource kits to deliver to each team location. Each kit should be stocked with the materials needed to perform those mission-essential tasks contemplated at each location.

At the brigade TOC, the BOLT should have a full copy of every necessary resource, to include all forms and publications, preferably in both electronic and hardcopy formats. Good packing lists can be found in chapter 32 of the 2001 edition of the *Operational Law Handbook,*[18] and on the CLAMO Web site at http://www.jagcnet.army.mil/CLAMO-Training. Prepared BOLTs also arrive at the JRTC with multiple copies of prepackaged claims and *Army Regulation (AR) 15-6*[19] investigation packets, ready for distribution to the claimant or investigating officer. The RDLs should be pre-loaded with all software, and the JA and SLNCO should *personally* check to ensure that all necessary programs and hardware (printers, scanners, cameras) work with the laptop before deploying.

Unit legal specialists should have copies of frequently used regulations and forms. For example, all battalion legal clerks should have *Department of the Army Form 2627* (Article 15),[20] copies of *AR 27-10* (Military Justice)[21] and *AR 15-6* (Investiga-

17. See LEGAL SPECIALIST, *supra* note 14, for a list of legal specialist tasks.

18. INT'L & OPERATIONAL L. DEP'T., THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, OPERATIONAL LAW HANDBOOK (2001).

19. U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (30 Sept. 1996).

tions), and the *Manual for Courts-Martial*. Maneuver battalion legal specialists should have copies of *AR 15-6* packets in the event of a fratricide or serious incident involving civilians. Legal personnel at the brigade support area (BSA) should stock claims packets, an EPW inspection checklist, a copy of *AR 735-5*,[22] and all other references necessary to support the legal mission at the BSA. When the JA determines that a given unit is likely to face sufficient legal issues to require dedication of a legal specialist, he should pre-position the resources that specialist will need to support that unit.

The BOLT should be able to identify and resolve legal issues as they arise within the brigade. To accomplish this, the team must be appropriately staffed, effectively organized, well trained, and appropriately supplied. Thorough BOLT preparation through the use of a coordinated training plan positions the team to succeed during a CTC rotation, maximizes the training value for the team members, and eases the friction legal issues pose for the brigade commander.

Having prepared the BOLT to accomplish its mission within the task force, the team must now integrate with the brigade staff to better receive information and influence operations to reduce the commander's legal exposure. The next note in this series will address TTPs to facilitate the BOLT's staff integration in operations.

For more information on JRTC, or to contact the OCs, see CLAMO's "Combat Training Centers" database at http://www.jagcnet.army.mil/CLAMO-CTCs. The JRTC Observer-Controller Team.

20. U.S. Dep't of Army, DA Form 2627, Record of Proceedings Under Article 15, UCMJ (Aug. 1984).

21. U.S. Dep't of Army, Reg. 27-10, Legal Services: Military Justice (20 Aug. 1999).

22. U.S. Dep't of Army, Reg. 735-5, Policies and Procedures for Property Accountability (31 Jan. 1999).

Environmental Law Division Notes

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces the Environmental Law Division Bulletin, which is designed to inform Army environmental law practitioners about current developments in environmental law. The ELD distributes its bulletin electronically in the environmental law database of JAGCNET, accessed via the Internet at http://www.jagcnet.army.mil.

European Union Moves to Criminalize Environmental Violations

On 13 March 2001, the European Commission "adopted a proposal for a Directive that for the first time would introduce legal sanctions for breaches of environmental law at an EU level."[1] Under this proposed directive, the European Union (EU) would require that member states criminalize "a range of activities already outlawed by existing EU legislation . . . when committed intentionally or with serious negligence. These offences would include polluting water supplies, various forms of air pollution, trading in protected species and serious damage to protected habitats."[2] Environment Commissioner Margot Wallström is quoted in the press release regarding the need for action by the EU as stating:

> The public is increasingly concerned about the continuous lack of application of environmental law in Member States . . . . It is clear that the question of effective sanctions needs to be narrowly linked to the environmental provision which shall have to be respected by citizens, economic operators and all actual or potential polluters.[3]

In the EU, directives are the functional equivalent of statutes, requiring member states to take action. The Commission transmits proposals for legislation simultaneously to the Council of Ministers and to the European Parliament. With respect to environmental matters, the co-decision process found in Article 251 of the Treaty of Maastricht applies.[4] Essentially both the Council and Parliament have equal footing in enacting, rejecting or amending the Commission's proposed directive. With regard to environmental matters, both of these bodies must enact a directive before it takes effect.[5] Major Robinette.

Life After Remedy Selection

In the March 2001 issue of *The Army Lawyer*, the Environmental Law Division Note examined how the Army gets to the stage of selecting a specific cleanup remedy under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).[6] Such remedies are generally outlined in the cleanup decision document known as the CERCLA Record of Decision (ROD).[7] For remedial actions, a ROD is issued at facilities on the EPA's National Priorities List (NPL) as well as at non-NPL sites.[8] This note looks at what happens after the ROD is signed.

Normally, when a CERCLA ROD is finalized, the Army—as lead agent (LA) in cleanup[9]— would begin the process of constructing and implementing the remedy that has been selected. The overarching requirements in the National Contingency Plan (NCP),[10] and the site-specific terms in the CERCLA

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1. *See* Press Release, Environmental Commission, European Union, Commission Will Support Member States in the Fight Against Environmental Crime (IP/01/358, Mar. 13, 2001), *available at* http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/358|0|AGED&lg=EN (Press Releases – Rapid database).

2. *Id.*

3. *Id.*

4. *See* Treaty Establishing the European Community, Mar. 25, 1957, art. 251, 298 U.N.T.S. 11, 37 I.L.M. 56) (amended by The Treaty on European Union, Feb. 7. 1992, 1992 O.J. (C 224), 31 I.L.M. 247 (The Maastricht Treaty)), *available at* http://europa.eu.int/eur-lex/en/treaties/dat/ec_cons_treaty_en.pdf.

5. *See id.* art. 175.

6. 42 U.S.C. §§ 9601-9675 (2000).

7. The selected cleanup remedy is outlined in the ROD. *See* 40 C.F.R. § 300.430(f) (2000). Sample RODs are available at http://www.epa.gov/superfund/whatissf/sfproces/rod.htm_(ROD/[state]). Additional cleanup actions also may be outlined in an appropriate decision document that follows NCP requirements. For removal actions, this could include an engineering evaluation and cost analysis. 40 C.F.R. § 300.415(b)(4)(i). Decision documents may also include action memoranda. *Id.* § 300.810(a)(4). Actions at sites where information does not prompt concerns over unacceptable risk to human health or the environment may be documented in a No Further Action ROD. Office of the Under Secretary of Defense, (Environmental Security), Management Guidance for the Defense Environmental Restoration Program, para. H.1.a.(1), (1998) [hereinafter Management Guidance].

8. For information on NPL sites, see 40 C.F.R. § 300.425(b).

cleanup ROD, outline how remediation will occur. At the time the ROD is signed, the decision maker is focused on getting the remedy functioning, so the site may be formally closed out. Sometimes, though, one can experience bumps in the road. For example, aspects of the ROD need to be changed or the administrative record may require supplementation. This note will consider such issues and then move on to discuss life after remedy selection.

Remedial Action and Remedial Design

Once the ROD is signed, it is time to carry out the terms of remediation. During this remedial design and remedial action (RD/RA) phase, decision makers and engineers begin the process of designing, constructing and implementing the selected remedy.[11] But, the LA is also required to let the public know what it is doing. So, before beginning the RD/RA, the LA should review the ROD's Community Relations Plan (CRP)[12] to determine if cleanup proposals involve any substantive issues that have not been raised before the public. If so, the CRP should be revised and additional public outreach should begin.[13] Assuming that the NCP's requirements for public involvement have been met, the LA must move forward to ensure that the remedial design and action will meet the terms specified in the ROD.[14] Specifically, the decision maker should ensure that the actions taken will meet the federal and state requirements identified in the ROD as applicable or relevant and appropriate requirements (ARARs).[15] With the exception of these general precepts, though, the NCP provides only a sketchy roadmap for the RD/RA process.[16] This is because remedial actions and designs are very site-specific.[17] The parties look to the terms of the ROD when determining the proper steps to be taken when implementing a cleanup action.[18] So, we will focus on the ROD and what happens if changes are needed.

A Little About the ROD's Terms

Under CERCLA, the ROD summarizes the reasoning of the decision maker by outlining cleanup options and presenting the terms of the selected remedy. This remedy must be both protective of human health and the environment and it must meet ARARs, unless an ARAR waiver is appropriate.[19] Once the remedy is chosen and the ROD is signed, the ARARs contained in the remedy decision are expected to remain constant—in essence, they are frozen.[20] This is done to protect the stability of the cleanup action. A ROD's ARARs are generally not reconsidered unless new facts cast doubt on the remedy's protectiveness or if an ARAR has been replaced with a revised promulgated standard.[21]

Changes to the ROD?

Sometimes, the LA may consider changing the ROD after the document is signed. If new information arises that could affect the selected remedy, the decision maker would consider the nature and extent of those changes.[22] Changes can range from small clarifications to fundamental shifts in the cleanup approach, so these scenarios are handled differently. Most

9. For background on the Army's role as CERCLA Lead Agent, see, 40 C.F.R. § 300.5 (1999). *See also* Exec. Order 12,580, 52 Fed. Reg. 2923 (Jan. 23, 1987). Cleanup responsibilities are also laid out in 42 U.S.C. § 9604(a).

10. *See generally* 40 C.F.R. pt. 300.

11. *Id.* § 300.435(a).

12. For details on the CRP, see 40 C.F.R. § 300.435(c)(1).

13. *Id.* §§ 300.435(c)(2)(i)-(ii).

14. *See* O'Reilly, RCRA and Superfund, A Practice Guide with Forms, Environmental Law Series § 11.19 (2nd ed. 1993) (Remedial Design and Remedial Action).

15. 40 C.F.R. §§ 300.435(b)(1)-(2). For additional information on ARARs, see 40 C.F.R. § 300.400(g).

16. Additional information on the RD/RA process is available on the EPA's Web site at http://www.epa.gov/superfund.

17. *See* O'Reilly, *supra* note 14, at § 12.13.

18. For more information on RODs and their terms, see Office of Solid Waste and Emergency Response, Environmental Protection Agency, Guide to Preparing Superfund Proposed Plans, Records of Decision, and Other Remedy Selection Decision Documents (July 1999) [hereinafter OSWER 9200.1-23P], *available at* http://www.epa.gov/superfund/resources/remedy/rods/index.htm.

19. 40 C.F.R. §§ 300.430(e)(9)(iii)(A)-(B). For information on ARAR waivers, see 40 C.F.R. § 300.430(f)(1)(ii)(B)(1).

20. For an extensive analysis of ARARs and their role in decision making, cleanup documentation, and finality, see Office of Solid Waste and Emergency Response, Environmental Protection Agency, RCRA, Superfund and EPCRA Hotline Training Module: Introduction to Applicable or Relevant and Appropriate Requirements 6-7 (Updated ed. 1998) (OSWER9205.5-10A), *available at* http://www.epa.gov/superfund/contacts/sfhotlne/arar.pdf.

21. 40 C.F.R. §§ 300.430(f)(1)(A)(ii), (B)(ii)(B)(2).

changes boil down to three issues: scope, performance, and cost.[23] These issues involve the following considerations:

> Scope: Does the change alter the scope of the remedy? (For example, would it affect the type of treatment technology used, the physical area of the response, the remediation goals or the type or volume of the CERCLA hazardous substances being addressed?);[24]
>
> Performance: Would the change alter the performance of the remedy? (For instance, would it change the treatment standards or the long-term reliability of the remedy?);[25]
>
> Cost: Are there significant changes in cost? (For example, suppose costs go up by 50%.);[26]

Normally, the LA looks at these factors and makes a determination as to whether a change is minor, significant or fundamental. Keep in mind that if multiple changes are expected, they should be examined together; a combination of minor and significant changes could lead, theoretically, to a fundamental change.[27] The categories of changes—minor, significant, and fundamental—are discussed below.

Minor Changes

Minor changes are those that would have little to no impact on the overall scope, performance or cost of the selected remedy, but should be documented in the administrative record to update or clarify cleanup plans.[28] Examples include minor cost increases or nondisruptive changes in equipment or services.[29]

Significant Changes

Significant changes are those that could affect part of the CERCLA remedy, without disturbing the ROD's ultimate conclusions.[30] In such a situation, terms of the remedial action, such as scope, performance or cost, may shift, but the remedy is not fundamentally altered.[31] For example, a significant change could be prompted if new evidence led a decision maker to conclude that cleanup waste could not be disposed of at a conventional landfill, but that it must be disposed at a permitted hazardous waste facility.[32] Other significant changes may include new promulgated standards that indicate that the ARARs cited in the ROD may not be protective or there is an important shift in land use assumptions (for example, from industrial to residential) that would seriously affect the risk scenarios upon which the remedy is based.[33]

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22. *Id*. § 300.430(f)(5)(iii)(B). *See* Office of Solid Waste and Emergency Response, Environmental Protection Agency, Guide to Addressing Pre-ROD and Post-ROD Changes (Apr. 1991) (Pub. 9355.3-02FS-4) [hereinafter Guide to Addressing Pre-ROD and Post-ROD Changes], *available at* http://www.epa.gov/superfund/tools/topics/relocation/gui_addr.pdf.

23. 40 C.F.R. § 300.435(c)(2).

24. *See* OSWER 9200.1-23.P, *supra* note 18, para. 7.2 (Types of Post-Record of Decision Changes).

25. *Id*.

26. *Id*.

27. *Id*.

28. 40 C.F.R. § 300.825(a)(2). The NCP is not a model of clarity on the distinctions between post-ROD changes. For additional guidance, see Guide to Addressing Pre-ROD and Post-ROD Changes, *supra* note 22, § II (Post-ROD Changes).

29. *See* O'Reilly, *supra* note 14, § 12-11 (Records of Decision, Amendments).

30. 40 C.F.R. § 300.435(c)(2)(i).

31. *Id*.

32. This scenario envisions the discovery that the residuals in question are hazardous waste governed by RCRA. For more details on post-ROD changes, see Guide to Addressing Pre-ROD and Post-ROD Changes, *supra* note 22, § II (Post-ROD Changes).

33. *See* OSWER 9200.1-23P, *supra* note 18, para. 7.1 (Highlight 7.1, Examples of Post-Record of Decision Changes).

If a significant change occurs, the Army, as LA, would be required to publish an Explanation of Significant Differences (ESD) outlining proposed changes to the remedial action.[34] This document is intended for the public and should explain, in plain terms, the reasons behind the new approach.[35] Generally, the ESD does not require a full-blown CERCLA analysis of decision-making criteria, but the document should state that the ROD remains protective and will meet ARARs.[36] The LA is then required to respond to the public's comments[37] but may continue to proceed with pre-design, design, construction and operation phases of the remedy.[38] The ESD and supporting information becomes part of the administrative record.[39]

Fundamental Change

Fundamental changes are major alterations in the scope, performance or cost of the selected remedy.[40] Generally, this happens when the decision maker anticipates changes in the remedy itself or a dramatic shift in the assumptions that underlie the remedy.[41] For example, fundamental changes may include a decision to use bioremediation of contaminated soil rather than thermal destruction, or a decision not to use an innovative technology because of problems with a pilot test of the program.[42]

When confronted with a fundamental change to the selected remedy, the LA would be required to amend the ROD.[43] The LA is responsible for analyzing and documenting this change in accordance with all of the NCP's decision-making criteria.[44] ROD amendments trigger a new round of public involvement.[45] A notice of the amendment to the ROD must be published in a major local newspaper with general circulation and made available to the public in a repository.[46] A public meeting would also be appropriate.[47] Once public input has been received, the Army would respond to comments.[48] These public comments and Army responses regarding a fundamental change to the ROD will become part of the administrative record.[49]

Other Post-ROD Additions to the Administrative Record

Even when the ROD's provisions remain unaltered, it still may be appropriate to supplement the administrative record. For example, the LA may add to the record to explain some aspect of the remedy, to discuss a point that the ROD does not address, or to outline an issue that was reserved for decision after the ROD was signed.[50]

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34. 40 C.F.R. § 300.435(c)(2)(i). For more detail on ESDs, see GUIDE TO ADDRESSING PRE-ROD AND POST-ROD CHANGES, *supra* note 22, § II (Post-ROD Changes, Explanation of Significant Changes).

35. 40 C.F.R. §§ 300.435(c)(2)(i)(A), (B)(ii).

36. *See* OSWER 9200.1-23P, *supra* note 18, para. 7.3.2.

37. 40 C.F.R. § 300.825(c).

38. *See* OSWER 9200.1-23P, *supra* note 18, para. 7.3.2.

39. 40 C.F.R. §§ 300.435(c)(2)(i)(A), 300.825(a)(2).

40. *Id.* § 300.435(c)(2)(ii).

41. *See* O'REILLY, *supra* note 14, §§12.11, 12.48 (Records of Decision, Amendments).

42. *Id*. *See* GUIDE TO ADDRESSING PRE-ROD AND POST-ROD CHANGES, *supra* note 22, § II (Post-ROD Changes, Highlight 4, Examples of Post-ROD Changes).

43. 40 C.F.R. § 300.435(c)(2)(i)(B)(ii).

44. The NCP's requirements can be found at 40 C.F.R. §§ 300.435(c)(2)(ii)(A)-(H). The portion of the ROD that is being amended would be analyzed in accordance with the nine criteria listed at 40 C.F.R. § 300.430(e)(G)(9)(iii). *See* OSWER 9200.1-23P, *supra* note 18, para. 7.3.3.

45. 40 C.F.R. § 300.430(e)(G)(9)(iii). *See* GUIDE TO ADDRESSING PRE-ROD AND POST-ROD CHANGES, *supra* note 22, § II (Post-ROD Changes, ROD Amendment).

46. 40 C.F.R. §§ 300.435(c)(2)(ii)(G)-(H).

47. *Id.* § 300.435(c)(2)(ii)(D).

48. *Id.* § 300.435(c)(2)(ii)(F).

49. *Id*.

50. *Id.* § 300.825(a).

When is the Remedy Complete?

Stepping past the issue of ROD changes and returning to the cleanup site, suppose that the LA is well into the remedy's construction and operation. What happens next? At this point, the LA would usually try to estimate the point at which no further remedial action is needed; in other words, when the remedy is complete.[51] Generally, the remedy is considered "operational and functional" within one year after the completion of construction or when the appropriate regulators agree that the remedy is functioning properly and performing as designed—whichever time is earlier.[52] However, the NCP may require longer site-specific timeframes for remedy completion, particularly if the cleanup involves ground or surface water restoration.[53] In such cases, the remedy must be performing properly for up to ten years after construction for the remedy to be considered operational and functional, unless sampling indicates that the water quality has met required standards.[54] This approach effectively extends the time period estimated for completion of operation and maintenance at such a site.[55]

Despite these alternative timeframes, the need for remedial action generally ends when the perceived threat to human health and the environment has been addressed or when risk-based standards, ARARs, have been met.[56] Once this has occurred, the LA may focus on specific operation and maintenance (O&M) measures outlined in the ROD for ensuring that the remedy will remain in place.[57] This may include the imposition of land use controls that limit the use of a site or restrict access to the property in question.[58] Once O&M measures are in place and remedial actions are working as intended, the remedy is ready to be formally classified as "operational and functional."[59] This determination is made with full coordination among the applicable regulators.[60]

Coordinating Site Closeout

Specific closeout requirements will differ depending on whether the site in question is on the National Priorities List (NPL)[61] or is a non-NPL site. One of the main differences between these categories is whether the EPA or State regulators would become the primary touchstone for communication.[62]

If a site is listed on the NPL, the Army works directly with the EPA (though often with the assistance of state regulators) to outline how remediation goals have been met.[63] A site on the NPL involves specific closeout steps.[64] For example, if the goals of remediation have been met, the site is delisted.[65] The LA specifically initiates EPA delisting procedures to get the site off the NPL.[66] Normally, a site is not deleted from the NPL unless it is determined that all required actions have been taken

51. It is possible that site-closeout could begin before the RD/RA phase—if it is clear that no further cleanup is needed. *See* OSWER 9200.1-23P, *supra* note 18, ch. 8.0 (Documenting No Action, Interim Action, and Contingency Remedy Decisions).

52. 40 C.F.R. § 300.435(f)(2).

53. *Id.* § 300.435(f)(3). For more information on cleanup decisions dealing with groundwater contamination, see OSWER 9200.1-23P, *supra* note 18, para. 9.4 (Documenting Groundwater Remedy Decisions).

54. 40 C.F.R. §§ 300.435(f)(3)(i)-(iii).

55. *Id.*

56. *Id.* § 300.430(f)(ii)(B).

57. *Id.* §§ 300.430(f)(1), 300.435(f).

58. Land Use Controls (LUCs) can include restrictions on how the property is used in the future. For example, if a cleanup remedy is based on the assumption that land is slated for industrial use, an inconsistent use (daycare) would not be appropriate. The LUCs may also include prohibitions against tampering with a remedy, or using fences and other means to limit activities at the site in question. *See* Memorandum, Deputy Under Secretary of Defense (Environmental Security), DUSD (ES/CL), to Assistant Secretaries of the Army, Navy, Air Force, and Director Defense Logistics Agency, subject: Policy on Land Use Controls Associated with Environmental Restoration Activities, para. 2 (17 Jan. 2001) [hereinafter LUC Memo] (Definition).

59. 40 C.F.R. § 300.435(f)(1).

60. *Id.* § 300.435(f)(2).

61. *See generally id.* § 300.425(b). Sites may be placed on the NPL if they score high under EPA's hazard ranking system. *See* 42 U.S.C. § 9605(c) (2000). This system is used to roughly assess threats associated with actual or potential CERCLA releases. O'REILLY, *supra* note 14, §12.04 (National Priorities List).

62. In general, the Army would work primarily with the EPA at NPL sites, while it would coordinate with state regulators at non-NPL sites. *See generally* 40 C.F.R. §§ 300.500, 300.515.

63. *Id.* §§ 300.515(e)(1), (2)(i)-(ii).

64. Specific terms for NPL site closure would generally be spelled out in a federal facility agreement negotiated between the Army and the EPA. *See* 42 U.S.C. § 9620(e)(2).

and that the site poses no unacceptable risk to human health or the environment.[67] Proposals to delete an NPL site must also be published to allow for public involvement with the decision.[68]

At non-NPL sites, where Army is the LA for cleanup decisions, the process of closeout is more flexible. When the cleanup reaches its final stages at non-NPL sites, the Army works together with the state where the site is located to discuss terms of closure.[69] Similarly, when moving towards site closeout, the Army also coordinates with the site's Restoration Advisory Board (RAB), if one has been formed.[70] After this coordination, the Army normally seeks written regulatory concurrence, which provides that cleanup goals have been met.[71] In addition, during the process of closeout at both NPL and non-NPL sites, the relevant parties look to technical and administrative mechanisms to assure that O&M requirements, such as land use controls, are maintained.[72] These O&M and LUC mechanisms help ensure that the remedy remains in place.[73]

Life After Remedy Completion

If the residual contamination is expected to remain at a site after cleanup is complete, the Army is required to conduct reviews of the remedy every five years.[74] The five-year review requirement is triggered when the decision maker selects a remedial action that "results in any hazardous substances, pollutants, or contaminants remaining at the site . . ."[75] if they are "above levels that allow for unlimited use and unrestricted exposure . . . ."[76] Such reviews are undertaken to ensure that: (1) The assumptions underlying that remedy remain valid;[77] (2) The remedy remains protective and fully functional;[78] and (3) The remedy remains cost effective.[79]

65. *See* O'REILLY, *supra* note 14, § 11.06 (National Priorities Delisting). For general information on delisting procedures, see OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, ENVIRONMENTAL PROTECTION AGENCY, CLOSE OUT PROCEDURES FOR NATIONAL PRIORITIES LIST SITES (Jan. 2000) (OSWER Dir. 9320.2-09A-P), *available at* http://www.epa.gov/superfund/resources/closeout/index.htm. For specific delisting requirements, see OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, ENVIRONMENTAL PROTECTION AGENCY, DIRECT FINAL PROCESS FOR DELETIONS (STREAMLINING THE DELETION PROCESS) (Oct. 2000) (OSWER Dir. 9320.2-12-FS-P), *available at* http://www.epa.gov/superfund/resources/deletion/deletion.pdf.

66. 40 C.F.R. § 300.425(e)(4).

67. *Id.* §§ 300.425(e)(1)(i)-(iii), (e)(4).

68. *Id.* §§ 300.425(e)(4)-(5) If the site has a Restoration Advisory Board, the Army would also coordinate with this Board.

69. Terms on closeout between the Army and state may be found in both the site-specific CERCLA ROD and the applicable Defense State Superfund Memorandum of Agreement (DSMOA). For more information on DSMOAs, see MANAGEMENT GUIDANCE, *supra* note 7, para. N.2. The NCP requirements may be found at 40 C.F.R. § 300.505.

70. For assistance on RAB coordination, see MANAGEMENT GUIDANCE, *supra* note 18, para. L.

71. It is in the Army's interest to work closely with the community, as well as the applicable federal and state regulators, to achieve a consensus as to whether a cleanup can be considered complete. *Id.* para. N.1.c.(4). This determination should be in writing to provide a level of finality.

72. 40 C.F.R. § 300.435(f)(1). This is one of the few times that the NCP refers to "institutional controls." For more detailed assistance, DOD has provided a number of documents discussing land use controls, outlining the legal mechanisms used to maintain these requirements. *See* LUC Memo, *supra* note 58, para. 4 (Policy), encl. 1 (Policy on Land Use Controls Associated with Environmental Restoration Activities for Property Planned for Transfer Out of Federal Control); Memorandum, Principal Assistant Deputy Under Secretary of Defense (Environmental Security), DUSD(ES/CL), to Assistant Secretaries of the Army, Navy, Air Force, and the Director, Defense Logistics Agency, subject: Guidance on Land Use Control Agreements with Environmental Regulatory Agencies (2 Mar. 2001). These are available on the Defense Environmental Network & Information eXchange Web site (DENIX) at http://www.denix.osd.mil.

73. The LUCs include physical, legal or administrative mechanisms that restrict property use or access. The LUCs often involve engineering controls, which are physical means of restriction, such as fences, signs, guards, or surveillance equipment, and institutional controls (ICs), which are legal mechanisms limiting access or use of property. The ICs encompass a variety of legal mechanisms, including deed restrictions, easements, restrictive covenants, notices, construction and dig permits, zoning, and others. *See* LUC Memo, *supra* note 58, para. 2 (Definition); B. Schafer, ENVTL. MONITOR, Fall 1999, at 6. An outline of EPA's approach to O&M is available at http://www.epa.gov/superfund/whatissf/sfproces/opmtc.htm.

74. 42 U.S.C. § 9621(c) (2000).

75. *Id*.

76. 40 C.F.R. § 300.430(f)(4)(ii).

77. DEP'T OF THE ARMY INFORMATION MANAGEMENT (DAIM), INTERIM ARMY GUIDANCE FOR CONDUCTING CERCLA FIVE-YEAR REVIEWS, para. 6b (5 Apr. 2000) [hereinafter DAIM INTERIM GUIDANCE], *available at* www.denix.osd.mil.

78. *Id*. For a list of EPA publications on CERCLA five-year reviews, see http://www.epa.gov/tio/products/compend/post-rem.htm.

79. The Army is required to determine that its cleanup funds are being spent properly. *See* DAIM INTERIM GUIDANCE, *supra* note 77, paras. 5a, 6b(8). Note that five-year reviews on active and Base Realignment and Closure sites will involve different funding sources.

If the five-year review reveals a problem with the selected remedy or if new information arises that calls into question the protectiveness of the remedy, the reviewer considers whether the ROD's terms should be amended.[80] Conversely, the Army may stop doing five-year reviews when such inspections are no longer needed.[81] Ms. Barfield.

80. The CERCLA gives a Lead Agent the authority to take steps to make sure the remedy remains protective if a periodic review reveals a problem. *See generally* 42 U.S.C. §§ 9604(a)-(b), 9604(e), 9620.

81. For more information on when it is proper to terminate five-year reviews at a given site, see DAIM INTERIM GUIDANCE, *supra* note 77, para. 5e.

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, United States Army (TJAGSA), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are nonunit reservists, through the United States Army Personnel Center (ARPERCEN), ATTN: ARPC-ZJA-P, 9700 Page Avenue, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—181

Course Name—133d Contract Attorneys Course 5F-F10

Course Number—133d Contract Attorney's Course 5F-F10

Class Number—133d Contract Attorney's Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen, showing by-name reservations.

The Judge Advocate General's School is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, LA, MN, MS, MO, MT, NV, NC, ND, NH, OH, OK, OR, PA, RH, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule

2001

July 2001

9-13 July	12th Legal Administrators Course (7A-550A1).
9-13 July	32nd Methods of Instruction Course (Phase I) (5F-F70).
16-20 July	76th Law of War Workshop (5F-F42).
16-27 July	1st Voice Recognition Training (512-71DC4).
16 July-3 August	MCSE Boot Camp.
30 July-10 August	147th Contract Attorneys Course (5F-F10).

August 2001

6-10 August	19th Federal Litigation Course (5F-F29).
6-17 August	2nd Voice Recognition Training (512-71DC4).
13 August-23 May 02	50th Graduate Course (5-27-C22).
20-24 August	7th Military Justice Managers Course (5F-F31).
20-30 August	36th Operational Law Seminar (5F-F47).

September 2001

10-14 September	2d Court Reporting Symposium (512-71DC6).
10-14 September	2001 USAREUR Administrative Law CLE (5F-F24E).
10-21 September	16th Criminal Law Advocacy Course (5F-F34).
17-21 September	1st Closed Mask Training (512-71DC3).
17-21 September	49th Legal Assistance Course (5F-F23).
18 September-11 October	156th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).

October 2001

1-5 October	2001 JAG Annual CLE Workshop (5F-JAG).
1 October-6 December	6th Court Reporter Course (512-71DC5).

9-26 October-	2nd JA Warrant Officer Advanced Course (7A-550A2).
12 October- 20 December	156th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
15-19 October	167th Senior Officers Legal Orientation Course (5F-F1).
22-26 October	55th Federal Labor Relations Course (5F-F22).
22-26 October	2001 USAREUR Legal Assistance CLE (5F-F23E).
29 October- 2 November	61st Fiscal Law Course (5F-F12).

November 2001

5-9 November	25th Criminal Law New Developments Course (5F-F35).
26-30 November	168th Senior Officers Legal Orientation Course (5F-F1).
26-30 November	2001 USAREUR Operational Law CLE (5F-F47E).

December 2001

3-7 December	2001 Government Contract Law Symposium (5F-F11).
3-7 December	2001 USAREUR Criminal Law Advocacy CLE (5F-F35E).
10-14 December	4th Fiscal Law Comptroller Accreditation Course—Hawaii (**Tentative**) (5F-F14).
10-14 December	5th Tax Law for Attorneys Course (5F-F28).

2002

January 2002

2-5 January	2002 Hawaii Tax CLE (5F-F28H).
6-18 January	2002 JAOAC (Phase II) (5F-F55).
7-11 January	2002 PACOM Tax CLE (5F-F28P).
7-11 January	2002 USAREUR Contract & Fiscal Law CLE (5F-F15E).
7-18 January	3rd Voice Recognition Training (512-71DC4).
8 January- 1 February	157th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
14-18 January	2002 USAREUR Tax CLE (5F-F28E).
23-25 January	8th RC General Officers Legal Orientation Course (5F-F3).
28 January- 1 February	169th Senior Officers Legal Orientation Course (5F-F1).

February 2002

1 February- 12 April	157th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).
4-8 February	2nd Closed Mask Training (512-71DC3).
4-8 February	77th Law of War Workshop (5F-F42).
4-8 February	2002 Maxwell AFB Fiscal Law Course (**Tentative**) (5F-F13A).
25 February- 1 March	62d Fiscal Law Course (5F-F12).
25 February- 8 March	37th Operational Law Seminar (5F-F47).
25 February- 26 April	7th Court Reporter Course (512-71DC5).

March 2002

4-8 March	63d Fiscal Law Course (5F-F12).
11-15 March	26th Administrative Law for Military Installations Course (5F-F24).
18-22 March	4th Contract Litigation Course (5F-F103).
18-29 March	17th Criminal Law Advocacy Course (5F-F34).
25-29 March	170th Senior Officers Legal Orientation Course (5F-F1).

April 2002

15-18 April	2002 Reserve Component Judge Advocate Workshop (5F-F56).
22-26 April	4th Basics for Ethics Counselors Workshop (5F-F202).
22-26 April	13th Law for Legal NCOs Course (512-71D/20/30).
29 April-10 May	148th Contract Attorneys Course (5F-F10).
29 April-17 May	45th Military Judge Course (5F-F33).

May 2002

6-10 May	3rd Closed Mask Training (512-71DC3).
13-17 May	50th Legal Assistance Course (5F-F23).
29-31 May	Professional Recruiting Training Seminar.

June 2002

3-7 June	5th Intelligence Law Workshop (5F-F41).
3-5 June	5th Procurement Fraud Course (5F-F101).
3-7 June	171st Senior Officers Legal Orientation Course (5F-F1).
3-14 June	4th Voice Recognition Training (512-71DC4).
3 June-28 June	9th JA Warrant Officer Basic Course (7A-550A0).
4-28 June	158th Officer Basic Course (Phase I, Fort Lee) (5-27-C20).
10-12 June	5th Team Leadership Seminar (5F-F52S).
10-14 June	32d Staff Judge Advocate Course (5F-F52).
17-21 June	13th Senior Legal NCO Management Course (512-71D/40/50).
17-21 June	6th Chief Legal NCO Course 512-71D-CLNCO).
24-26 June	Career Services Directors Conference.
24-28 June	13th Legal Administrators Course (7A-550A1).
28 June-6 September	158th Officer Basic Course (Phase II, TJAGSA) (5-27-C20).

July 2002

8-12 July	33d Methods of Instruction Course (5F-F70).
15-19 July	78th Law of War Workshop (5F-F42).
15 July-2 August	MCSE Boot Camp.
15 July-13 September	8th Court Reporter Course (512-71DC5).
29 July-9 August	149th Contract Attorneys Course (5F-F10).

August 2002

5-9 August	20th Federal Litigation Course (5F-F29).
12 August-22 May 03	51st Graduate Course (5-27-C22).
12-23 August	38th Operational Law Seminar (5F-F47).
26-30 August	8th Military Justice Managers Course (5F-F31).

September 2002

9-13 September	2002 USAREUR Administrative Law CLE (5F-F24E).
23-27 September	3rd Court Reporting Symposium (512-71DC6).
16-20 September	51st Legal Assistance Course (5F-F23).
16-27 September	18th Criminal Law Advocacy Course (5F-F34).

3. Civilian-Sponsored CLE Courses

24 August ICLE	Nuts and Bolts of Family Law Savannah Marriott Riverfront Savannah, Georgia
28 September ICLE	Selecting and Influencing Your Jury Sheraton Colony Square Hotel Atlanta, Georgia
15-19 October	Military Administrative Law Conference and The Honorable Walter T. Cox, III, Military Legal History Symposium Spates Hall, Fort Myer, Virginia

4. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

Jurisdiction	**Reporting Month**
Alabama**	31 December annually
Arizona	15 September annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	December 31, Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	30 days after program
Kentucky	30 June annually
Louisiana**	31 January annually
Maine**	31 July annually
Minnesota	30 August
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	prior to 30 April annually
New York*	Every two years within thirty days after the attorney's birthday
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Minimum credits must be completed by last day of birth month each year
Utah	31 January
Vermont	2 July annually
Virginia	30 June annually
Washington	31 January triennially
West Virginia	30 June biennially
Wisconsin*	1 February biennially
Wyoming	30 January annually

* Military Exempt

** Military Must Declare Exemption

For addresses and detailed information, see the March 2001 issue of *The Army Lawyer.*

5. Phase I (Correspondence Phase), RC-JAOAC Deadline

The suspense for first submission of all RC-JAOAC Phase I (Correspondence Phase) materials is ***NLT 2400, 1 November 2001***, for those judge advocates who desire to attend Phase II (Resident Phase) at The Judge Advocate General's School (TJAGSA) in the year 2002 ("2002 JAOAC"). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

Any judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGSA, for grading with a postmark or electronic transmission date-time-group ***NLT 2400, 30 November 2001***. Examinations and writing exercises will be expeditiously returned to students to allow them to meet this suspense.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by these suspenses will not be allowed to attend the 2002 JAOAC. To provide clarity, all judge advocates who are authorized to attend the 2002 JAOAC will receive written notification. Conversely, judge advocates who fail to complete Phase I correspondence courses and writing exercises by the established suspenses will receive written notification of their ineligibility to attend the 2002 JAOAC.

If you have any further questions, contact Lieutenant Colonel Dan Culver, telephone (800) 552-3978, ext. 357, or e-mail Daniel.Culver@hqda.army.mil. Lieutenant Colonel Culver.

Current Materials of Interest

1. TJAGSA Materials Available through the Defense Technical Information Center (DTIC)

For a complete listing of TJAGSA Materials Available through DTIC, see the March 2001 issue of *The Army Lawyer.*

2. Regulations and Pamphlets

For detailed information, see the March 2001 issue of *The Army Lawyer.*

3. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some case. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available through the JAGCNet.

b. Access to theJAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff.

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (that is, U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed:

LAAWSXXI@jagc-smtp.army.mil

c. How to logon to JAGCNet:

(1) Using a web browser (Internet Explorer 4.0 or higher recommended) go to the following site: http://jagcnet.army.mil.

(a) Follow the link that reads "Enter JAGCNet."

(b) If you already have a JAGCNet account, and know your user name and passwor, select "Enter" from the next menu, then enter your "User Name" anbd "password" in the appropriate fields.

(c) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact your legal administrator or e-mail the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(d) If you do not have a JAGCNet account, select "Register" from the JASGCNet Intranet menu.

(e) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process.' Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(f) Once granted access to JAGCNet, follow step (b), above.

4. Articles

The following information may be useful to judge advocates:

Winston P. Nagan, *Lawyer Roles, Identity, and Professional Responsiblity in an Age of Globalism*, 13 FLA J. INT'L L. 131 (Spring 2001).

Laura Krugman Ray, *The Road to* Bush v. Gore*: The History of the Supreme Court's Use of the Per Curiam Opinion*, 79 NEB. L. REV. 517 (2000)

Christopher E. Smith, *Criminal Justice and the 1999-2000 U.S. Supreme Court Term*, 77 N.D. L. REV. 1 (2001).

5. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information, see the March 2001 issue of *The Army Lawyer.*

6. TJAGSA Legal Technology Management Office (LTMO)

The Judge Advocate General's School, United States Army (TJAGSA), continues to improve capabilities for faculty and staff. We have installed new computers throughout the School. We are in the process of migrating to Microsoft Windows 2000 Professional and Microsoft Office 2000 Professional throughout the School.

The TJAGSA faculty and staff are available through the MILNET and the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by calling the LTMO at (804) 972-6314. Phone numbers and e-mail addresses for TJAGSA personnel are available on the School's Web page at http://www.jagcnet.army.mil/tjagsa. Click on directory for the listings.

For students that wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is web browser accessible prior to departing your office. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, you may establish an account at the Army Portal, http://ako.us.army.mil, and then forward your office e-mail to this new account during your stay at the School. The School classrooms and the Computer Learning Center do not support modem usage.

Personnel desiring to call TJAGSA can dial via DSN 934-7115 or, provided the telephone call is for official business only, use our toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact our Legal Technology Management Office at (804) 972-6264. CW3 Tommy Worthey.

7. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) Administrator, Ms. Nelda Lull, must be notified prior to any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Ms. Lull can be contacted at The Judge Advocate General's School, United States Army, ATTN: JAGS-CDD-ALLS, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 934-7115, extension 394, commercial: (804) 972-6394, facsimile: (804) 972-6386, or e-mail: lullnc@hqda.army.mil.

8. Kansas Army National Guard Annual JAG Officer's Conference

The Kansas Army National Guard is hosting their Annual JAG Officer's Conference at Washburn Law School, Topeka, Kansas, on 20-21 October 2001. The point of contact is Major Jeffry L. Washburn, P.O. Box 19122, Pauline, Kansas 66619-0122, telephone (785) 862-0348.

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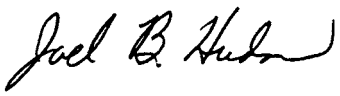

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